SUPREME COURT, U. S.

FILED

AUG 14 1967

JOHN F. DAVIS, CLERK

No. 489

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER SESSION, 1967

GOVERNOR LURLEEN BURNS WALLACE, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; ALABAMA STATE BOARD OF EDUCATION; ERNEST STONE, Secretary and Executive Officer of Alabama State Board of Education; JAMES D. NETTLES, ED DANNELLY, MRS. CARL STRANG, FRED L. MERRELL, W. M. BECK, VICTOR P. POOLE, W. C. DAVIS, CECIL WARD and HAROLD C. MARTIN, as members of Alabama State Board of Education,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

JURISDICTIONAL STATEMENT IN BEHALF OF APPELLANTS

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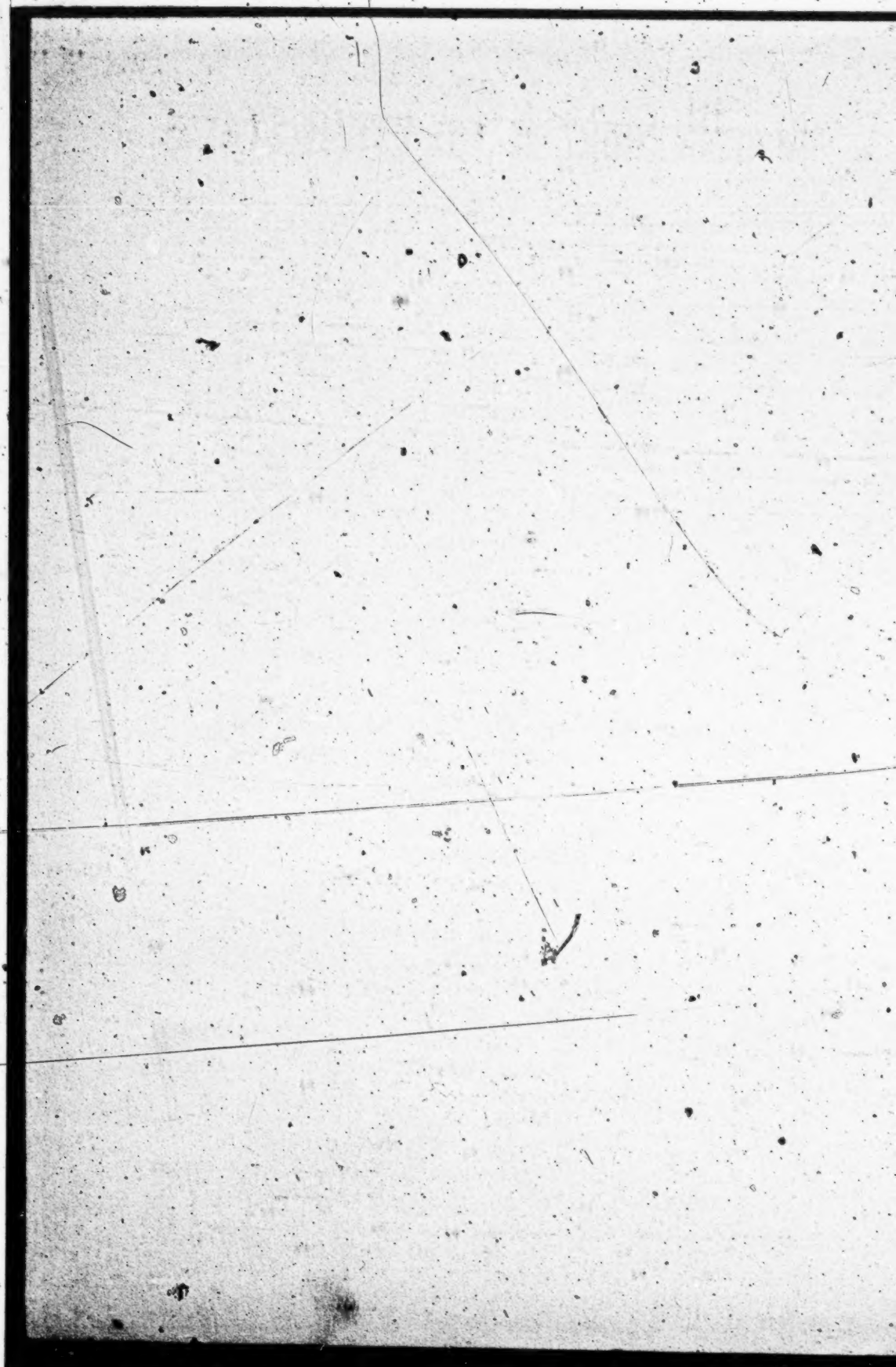

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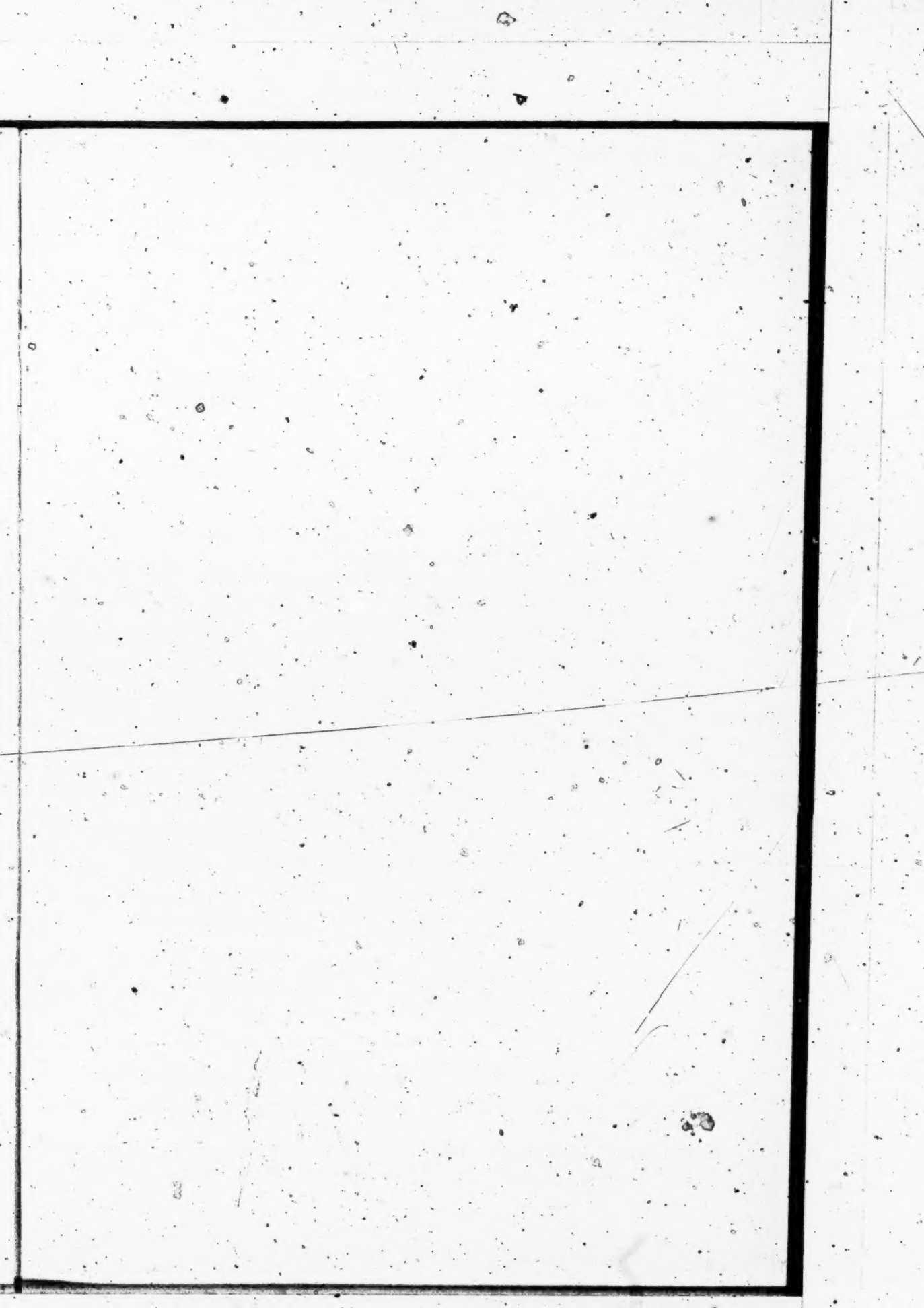

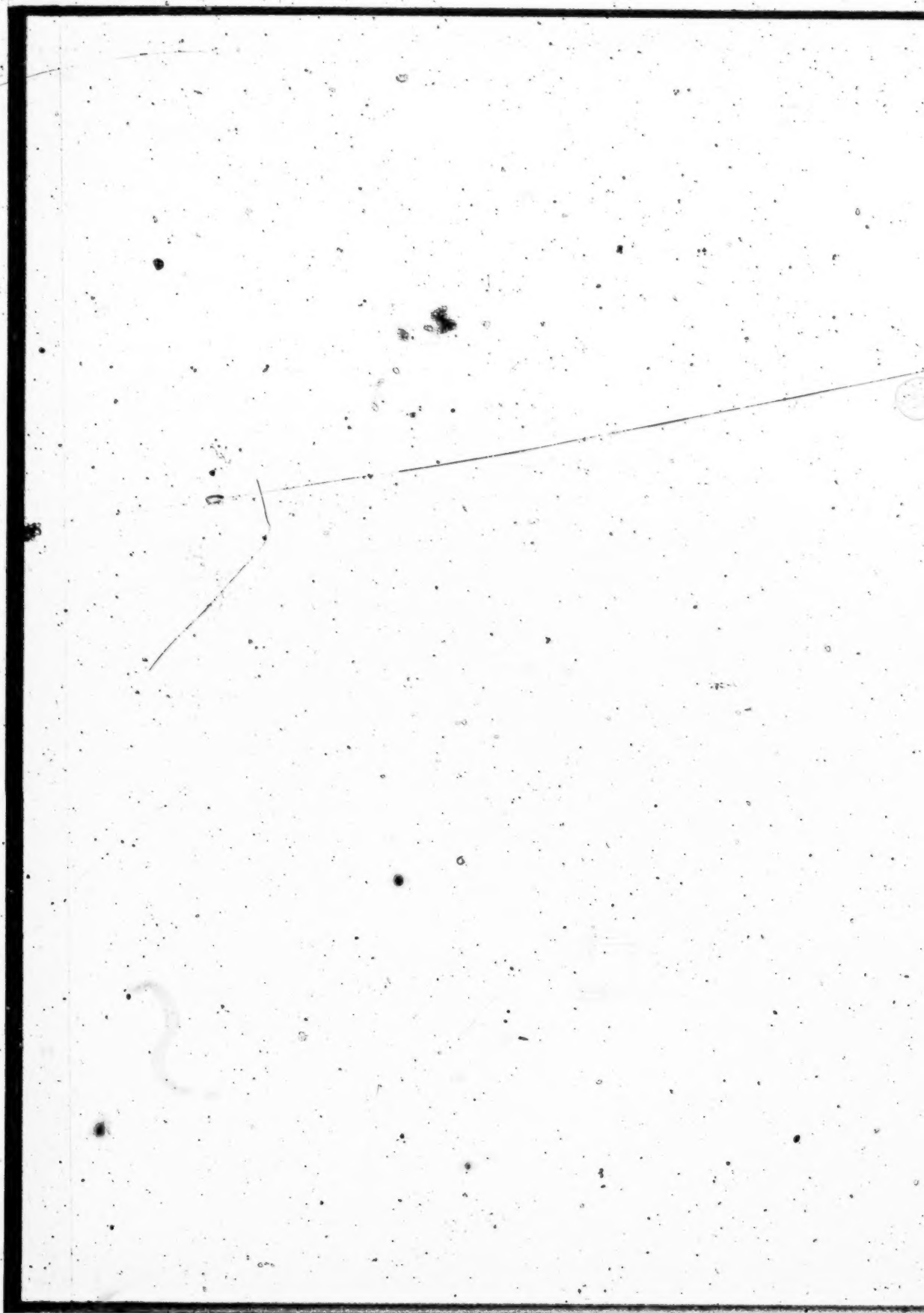

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER SESSION, 1967

GOVERNOR LURLEEN BURNS WALLACE, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; ALABAMA STATE BOARD OF EDUCATION; ERNEST STONE, Secretary and Executive Officer of Alabama State Board of Education; JAMES D. NETTLES, ED DANNELLY, MRS. CARL STRANG, FRED L. MERRELL, W. M. BECK, VICTOR P. POOLE, W. C. DAVIS, CECIL WARD and HAROLD C. MARTIN, as members of Alabama State Board of Education,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

JURISDICTIONAL STATEMENT IN BEHALF OF APPELLANTS

1.

Reference to the Official and Unofficial Reports of the Decrees, Orders and Opinions Delivered in the Court Below

Decree dated March 22, 1967, signed by United States Circuit Judge Richard T. Rives, United States District

Judge H. H. Grooms and United States District Judge Frank M. Johnson, Jr., together with exhibits thereto which are a part thereof, a copy being appended hereto as Appendix 1.

Opinion filed March 22, 1967, signed by United States Circuit Judge Richard T. Rives, United States District Judge H. H. Grooms and United States District Judge Frank M. Johnson, Jr., in this case a copy being appended hereto as Appendix 2.

Reference is made under the rules of this Court to four prior opinions in this case, none of which are of materiality as to the issues here, but which are required by said rule of this Court:

Anthony T. Lee et al., and United States of America, Plaintiff and Amicus Curiae v. *Macon County Board of Education,* (1963) 221 F. Supp. 297.

United States v. *Wallace,* (1963), 222 F. Supp. 485.

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Lee and the United States of America, Plaintiff and Amicus Curiae v. *Macon County Board of Education,* (1964) 231 F. Supp. 743.

Opinions in companion cases and later proceedings, orders, and opinions in this case which are "necessary to ascertain the grounds of the judgment or decree" as provided in the rules of this Court, are as follows:

Opinion and dissenting opinion of the Court of Appeals of the Fifth Circuit in *United States of America, Intervenor and Linda Stout et als.* v. *Jefferson County Board of Education* rendered by a three-judge panel of that court on the 29th day of December, 1966 and reported in 372 F.2d 836.

Opinion and dissenting opinion of the Court of Appeals of the Fifth Circuit sitting en banc reviewing the

original opinion and decree rendered by the three-judge panel in the case of *United States of America, Intervenor and Linda Stout et als.* v. *Jefferson County Board of Education,* dated March 29, 1967, not yet reported, appended as Appendix 3.

Notice of Appeal to the Supreme Court of the United States filed by Governor Lurleen Burns Wallace et als., filed April 7, 1967, appended hereto as Appendix 4.

Motion for extension of time for the filing of the record and of the Jurisdictional Statement by the Appellants, filed on June 3, 1967, appended hereto as Appendix 5.

Order extending time to July 6, 1967 for the filing of the record and of the Jurisdictional Statement which is dated June 3, 1967, appended hereto as Appendix 6.

Motion for additional extension of time up to and including August 5, 1967, for the filing of the record and the Jurisdictional Statement by the appellants, appended hereto as Appendix 7.

Order extending the time up to and including August 5, 1967, for the filing of the record and of the Jurisdictional Statement, appended hereto as Appendix 8.

Order dated April 24, 1967, adding as defendants certain officials of the Autauga County, Bibb County, Cullman County and Pickens County school systems, appended hereto as Appendix 9.

Motion of Governor Lurleen Burns Wallace et als., filed May 13, 1967, to drop such persons as defendants, appended hereto as Appendix 10.

Order dated May 18, 1967, denying Motion of Governor Lurleen Burns Wallace et als., to Drop Defendants, denying objection of Bibb County Board of Education and its officials, dismissing as moot Autauga County, Cullman

County and Pickens County officials (as they have complied with all the requirements of the Court) and granting an injunction with a plan of desegregation attached against the Bibb County Board of Education and its officials, appended hereto as Appendix 11.

Order dated May 26, 1967, adding school officials of Marengo County, Linden City, Jasper City, Marion County and Thomasville City School Systems as defendants, appended hereto as Appendix 12.

Notice of Appeal to the Supreme Court of the United States by the Bibb County Board of Education and its officials, dated June 16, 1967, together with Notice of Appeal to the United States Court of Appeals for the Fifth Circuit, appended hereto as Appendix 13.

Cross designation of record for certification by the Department of Justice in response to Notice of Appeal by the Bibb County Board of Education and its officials, dated July 10, 1967, appended hereto as Appendix 14.

Order dated June 14, 1967, of the Court requiring certain actions by the Marion County School System, The Thomasville City School System, the Marengo County School System, the Linden City School System, and the Jasper City School System, including injunction, appended hereto as Appendix 15.

Order of the Court, dated June 26, 1967, finding that the officials of the City of Linden have complied with the Order and have been discharged as parties defendant and that the Marengo County officials are granted until July 15, 1967, within which to file further information, appended hereto as Appendix 16.

Order adding as parties defendant John W. Gardner, Secretary of Health, Education and Welfare, R. Peter

Libassi, United States Commissioner of Education, and James R. Dunn, Attorney for the Department of Health, Education and Welfare, dated July 14, 1967, appended hereto as Appendix 17.

Temporary restraining order and order setting cause for hearing, dated July 14, 1967, as to the Lanett City School System and affecting the newly added defendants as well as the Department of Justice and the United States District Attorney, appended hereto as Appendix 18.

Order dated July 28, 1967, copy of which is attached as Appendix 28.

Motion and order extending the time up to and including August 14, 1967, for the filing of the record and of the Jurisdictional Statement, appended hereto as Appendix 29.

2.

A Concise Statement of the Grounds on Which the Jurisdiction of the Court Is Invoked

The decree of the court below was a decree dated and entered on March 22, 1967, by a three-judge court constituted pursuant to Sections 2281 and 2284, Title 28 United States Gode, for the purpose of hearing this cause in United States District Court for the Middle District of Alabama, Eastern Division, composed of United States Circuit Judge Richard T. Rives and United States District Judges H. H. Grooms and Frank M. Johnson, Jr. This appeal is taken pursuant to 28 United States Code, Section 1253. Said Court was constituted, in accordance with the provisions of the statutes of the United States, by order granted on the 6th day of February, 1964, a copy of which is attached hereto as Appendix 21 (p. A256).

The judgment or decree sought to be reviewed and the time of its entry is the decree and opinion rendered and filed on March 22, 1967, copies of which have heretofore been referred to and attached as Appendices Nos. 1 and 2 to this Jurisdictional Statement (pp. A1-A67), together with the proceedings had thereafter upon the refusal of the three-judge court and of this Court to grant a stay pending appeal (pp. A149-A257).

The Notice of Appeal was filed on the 7th day of April, 1967, in the said three-judge court fully described above, a copy thereof having been attached hereto as Appendix 4 (p. A149). The time for the filing of the transcript of the record and the Jurisdictional Statement was extended to August 5, 1967, by the three-judge court (pp. A162-3, A170-1). A copy of the motions and orders resulting in such extension are attached as Appendices 5, 6, 7, and 8 (pp. A157-A171).

The statutory provision believed to confer jurisdiction of this appeal upon the Supreme Court of the United States is Title 28 Section 1253 of the United States Code Annotated having been enacted on June 25, 1948, c. 646, 62 Stat. 928.

3.

Nature of the Proceeding and the Statutes Pursuant to Which It Is Brought

This action was initiated by supplemental complaints filed by the United States of America acting through the Attorney General as plaintiff-intervenor and amicus curiae in September and November, 1966, seeking (a) to have declared unconstitutional a tuition grant law passed by the legislature of the State of Alabama and approved by the governor on September 1, 1965, which appears as Title

52, #61 (8) of the Code of Alabama and (b) as described by the three-judge court (p. A31) "asking for a state-wide desegregation order and an injunction against the use of state funds to support a dual school system."

We adopt as a part of this paragraph the allegations of the preceding paragraph numbered 2 entitled "A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED" describing the federal statutes pursuant to which this action purports to be brought.

In the said supplemental complaints and the decree granted herein (as well as the evidence introduced in this court) no relief was sought or granted against the Macon County Board of Education or in favor of any of the individual and original plaintiffs to this suit, except to the extent that the original plaintiffs and defendants are incidently affected by the declaration that the tuition grant law is unconstitutional. This is actually a proceeding which has been extended far beyond the jurisdiction of the three-judge court under the statutes above cited. As prosecuted and determined by the provisions of the opinion and the decree, this action now is:

(1) An action by the Attorney General of the United States against the officials of ninety-nine named Alabama school districts, none of whom were served with process, granted an opportunity to be heard, to cross-examine witnesses, to introduce evidence or to otherwise participate in the judicial proceeding which resulted in the decree and plan of desegregation embodied therein.

(2) No relief being sought or granted against the state officials joined in the supplemental proceeding in favor of the original plaintiffs as to the Macon County Board of Education, this is now an action brought by the Attorney

General of the United States against state officials to obtain an injunction requiring them, through judicial compulsion, to force the officials of ninety-nine school districts in Alabama to act in detailed and specified manners in the administration of their schools, without any evidential hearing concerning such schools and without any process of law whatsoever. The only issue in the orders "to show cause" has been whether the district involved has complied with the decree promulgated without due process of law upon such district.

(3) As no relief was sought or granted to the class represented by the individual plaintiffs who were students and parents of students in the Macon County Schools, this is now an action by the Attorney General alone without the initiation by or joinder of any members of the class or classes affected. These are the students in the ninety-nine public school systems affected and students and parents of students in trade schools, junior colleges and state colleges administered by the Alabama State Board of Education.

Hence the detailed discussion of matters occurring in relation to the Macon County Board of Education and activities of the various state officials connected therewith contained both in the opinion of the court and in the briefs filed by the Attorney General in the court below are incompetent, irrelevant and immaterial. In fact, the recitations contained in the opinion on pages A28 through A36 have no relationship whatsoever to the present proceeding.

A careful review of every page of the opinion of the court below (pp. A27 through A67) demonstrates that the evidence and the finding of the court thereon relate to local boards of education other than the Macon County Board of Education. This also demonstrates that the evi-

dence and the findings of the court relate to the students and parents in other districts and other schools. It is a travesty upon the American conception of justice for such findings to be made and compulsion to be invoked against persons having no opportunity to participate in the proceeding.

By the motion to dismiss filed in behalf of the defendant state officials, by objections entered into the record and by the pleadings herein filed, all of these constitutional questions were preserved. If jurisdiction is noted in this appeal and the record printed, detailed and particular reference may be made to these actions.

4.

The Cases Believed to Sustain the Jurisdiction of This Court

The following is a list of cases, statutes, and textbooks citations upon which we will rely in this appeal:

Armstrong v. *Board of Education of Birmingham*, 323 F.2d 333, 333 F.2d 47.

Avery v. *Wichita Falls Independent School District*, 1956, 241 F.2d 230.

Ballf v. *Kranz*, 82 F.2d 315 (1936).

Bell v. *School City of Gary*, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964).

Board of Education of the Oklahoma City Public Schools v. *Dowell*, ... F.2d ..... (10th Cir., January 23, 1967, cert. denied, 35 U.S.L. Week 3418 (U.S. May 29, 1967).

Borders v. *Rippy*, 1957, 247 F.2d 268.

Boson v. *Rippy*, 285 F.2d 43, 48 (5th Cir. 1960).

Bowman v. *County School Board of Charles City County, Va.*, ... F.2d ..... (4th Cir., June 12, 1967).

Boynton v. *Commonwealth of Virginia*, 364 U.S. 454, 81 S. Ct. 182, 5 L. Ed. 2d 206.

Bradley v. *School Board of Richmond*, 345 F.2d 310 (4th Cir.), vacated and remanded on other grounds, 382 U.S. 103, 15 L. Ed. 2d 187, 86 S. Ct. 224 (1965).

Briggs v. *Elliott*, 132 F. Supp. 776 (E.D. S.C. 1955).

Brown v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873.

Brown v. *Board of Education of Topeka*, 347 U.S. 294 (1954).

Brown v. *Board of Education of Topeka*, 349 U.S. 294 (1955).

Burton v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45.

Bush v. *Orleans Parish School Board*, 308 F.2d 491.

Calhoun v. *Latimer*, 321 F.2d 302 (5th Cir., 1963).

Calhoun v. *Latimer*, 377 U.S. 263 (1964).

City of Montgomery v. *Gilmore*, 1960, 277 F.2d 364.

Clark v. *Board of Education of Little Rock School Dist.*, 369 F.2d 661 (8th Cir., 1966), rehearing denied, 374 F.2d 569 (8th Cir., 1967).

Clute v. *Superior Ct.*, 155 Cal. 15, 99 P. 362, 132 Am. St. Rep. 54 (1908).

Cohen v. *Public Housing Administration*, 1958, 257 F.2d 73.

Cooper v. *Aaron*, 358 U.S. 1, 19 (1958).

Deal v. *Cincinnati Board of Education*, 369 F.2d 55 (6th Cir., 1966).

Denzel Milton Lee v. *United States of America*, 322 F.2d 770.

Downs v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir., 1964), cert. denied, 380 U.S. 914 (1965).

East Baton Rouge Parish School Board v. *Davis*, 289 F.2d 380 (5th Cir., 1961), cert. denied, 368 U.S. 831.

Evans v. *Ennis*, 281 F.2d 385.

Evers v. *Jackson*, 1964, 328 F.2d 408.

Goss v. *Board of Education of City of Knoxville*, 373 U.S. 683, 687, 689 (1963).

Green v. *County School Board of New Kent County, Virginia*, ... F.2d ..... (4th Cir., June 12, 1967).

Green v. *United States*, 283 F.2d 687 (1960).

Helbig v. *Phillips*, 109 N.J. Eq. 546, 158 Atl. 441, 93 A.L.R. 706.

Helms Groover & Dubber Co. v. *Copenhagen*, (1919) 93 Ore. 410, 177 P. 935.

Henderson v. *United States*, 339 U.S. 816, 70 S. Ct. 843, 94 L. Ed. 1302.

Hovey v. *McDonald*, 27 L. Ed. 888, 891, 109 U.S. 150.

In re Henry v. *Wolenski*, (1963) 324 F.2d 309.

James Tomez et al. v. *Board of Education, Waukegan City School District*, Supreme Court of Illinois, Docket No. 40292, rendered March 23, 1967.

Jeffers v. *Whitley*, 309 F.2d 621.

Jefferson County Board of Education v. *Linda Stout et al.*, Slip Opinions dated December 29, 1966, and March 29, 1967.

Johnson v. *Virginia*, 373 U.S. 61, 83 S. Ct. 1053.

Kelley v. *Atheiner School District*, Docket No. 18528, Court of Appeals of the 8th Circuit, decided April 12, 1967, not yet reported.

Kelley v. *Board of Education of City of Nashville*, 270 F.2d 209 (6th Cir., 1959).

Lockett v. *Board of Education of Muscogee County*, 342 F.2d 225 (5th Cir., 1965).

Longview Tugboat Company v. *Jameson*, 218 F.2d 547 (1955).

Maryland v. *Limburg*, 87 F. Supp. 308, 313.

Merrimack River Sav. Bank v. *Clay Center*, 55 L. Ed. 320, 219 U.S. 527.

Migel v. *McCarl*, 291 U.S. 442, 78 L. Ed. 901.

Monroe v. *Board of Commissioners of City of Jackson, Tennessee*, rendered July 21, 1967 by Court of Appeals of the 6th Circuit, No. 17118 upon its docket, not yet reported.

Olson v. *Board of Education of Malverne, New York*, 250 F. Supp. 1000, 1006 (E.D. N.Y. 1966).

Opinion of the Justices of the Supreme Court of Alabama, 160 So.2d 648.

Pennsylvania R. R. Co. v. *National Docks Co.*, 54 N.J Eq. 647, 35 Atl. 433.

Peterson v. *City of Greenville*, 373 U.S. 244, 83 S. Ct. 1119.

Petrowski v. *Nutt*, 161 F.2d 938 (1947).

Rippy v. *Borders*, 1957, 257 F.2d 73.

Rogers v. *Paul*, 382 U.S. 198 (1965).

Rogers v. *Paul*, 345 F.2d 117, 86 S. Ct. 358.

Shelley v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161.

Shields v. *Barrow*, 1855, 17 How. 129, 58 U.S. 129, 15 L. Ed. 158.

Shuttlesworth v. *Birmingham Board of Education*, 358 U.S. 101 (1958).

Smith v. *Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987.

Springfield School Committee v. *Barksdale*, 348 F.2d 261, 264 (1st Cir., 1965).

Standard Oil Company v. *Marshall*, 265 F.2d 46.

tate of Washington v. *U. S.*, 87 F.2d 421.

Steele v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S. Ct. 226.

Stell v. *Savannah-Chatham County Board of Education*, 333 F.2d 55, 59 (5th Cir., 1964).

Stewart v. *Superior Ct.*, (1893) 100 Cal. 543, 35 P. 156.

Strauder v. *West Virginia*, 100 U.S. 303, 25 L. Ed. 664.

Swain v. *Alabama*, 380 U.S. 202, 226-28 (1965).

Swann v. *Charlotte—Mecklenburg Board of Education*, 369 F.2d 29.

United States et al. v. *Jefferson County Board of Education et al.*, ... F.2d .....

Virginia R. Co. v. *United States*, 71 L. Ed. 463, 469, 272 U.S. 685.

Warner Valley Stock Co. v. *Smith*, 165 U.S. 28, 41 L. Ed. 621.

Watson v. *City of Memphis*, 373 U.S. 526, 83 S. Ct. 1314.

White v. *Administrator of General Services Admin. of U. S.*, 343 F.2d 444 (1965).

Winters v. *New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665.

Civil Rights Act of 1964, 78 Stats. 246, Sections 401, 407, 601, 602 and 604.

Constitution of the United States: Fourteenth Amendment.

28 U.S.C., Paragraph 1254 (1).

Bickel, "The Decade of School Desegregation," 64 Colum. L. Rev. 193, 213-15 (1964).

Code of Alabama 1940, Title 52, Sections 61 (4), 62, 71, 73, 74, 76.

Cyclopedia of Federal Procedure, 3rd Ed., V. 15, Para. 84, 34, p. 353.

4 Am. Jur. 2d, Sec. 387, p. 855.

93 A.L.R. 710.

Title 28, U.S.C., Sec. 1253.

Dr. Max Wolff, "The Educational Park," Conference on Education and Racial Imbalance in the City, p. 4 (March, 1967).

Racial Isolation in the Public Schools (1967).

Survey of School Desegregation in the Southern and Border States, 1965-1966 (February, 1966).

There is involved the validity of the Tuition Grant Statute of Alabama including Act of Alabama 1965, #61 (8), Title 52, Code of Alabama, a copy thereof being attached hereto as Appendix 25, and made a part hereof as if fully copied herein.

If a motion to dismiss or affirm is filed under Rule 16.1 of this Court, we will expect to file opposing brief detailing the effect of such cases which sustain this appeal, as is provided by Rule 16.3 of the rules of this Court.

5.

Questions Presented by the Appeal, Expressed in the Terms and Circumstances of the Case but Without Unnecessary Detail

1. None of the original plaintiffs (members of the class attending schools in Macon County) and none of original defendants (the members of the Macon County Board of Education) were affected by the decree rendered by this Court on March 22, 1967, nor are any of such parties appellants or appellees herein. Can this supplementary proceeding filed by the Attorney General of the United States as Intervenor and Plaintiff be maintained against state officers of Alabama when the only actual parties having an interest in the controversy are ninety-nine local school districts, the officials and students of which were not parties to the suit, have had no opportunity to be heard in the determination of all issues, formulation of decree and plan of desegregation contained

therein, without due process of law and contrary to the Constitution of the United States and particularly the Fifth Amendment thereof?

2. Under the Civil Rights Act of 1964 and other statutory provisions (particlarly section 407(a) of said Act), does the Attorney General of the United States have the right to prosecute this suit as plaintiff-intervenor without either allegation or proof complying with the conditions precedent set forth in said act as to the public schools, trade schools, junior colleges, or state colleges affected hereby?

3. Does the Court here have the authority to mandatorially enjoin state officials (particularly the State Superintendent of Education) to require action by ninety-nine local school districts, as to which such state officials have no authority under the Constitution and Statutes of Alabama and particularly:

(a) The placement, assignment and transfer of students.

(b) The transfer or reassignment of teachers.

(c) The closing of public schools.

(d) The control of expenditure of funds in the nature of grants-in-aid to students in the public school system.

(e) The furnishing, direction and control of the transportation of pupils.

(f) The location and construction of school facilities.

4. Did the lower court have the authority to grant a mandatory injunction requiring affirmative detailed and continuous administrative actions by state and local of-

ficials which destroys their "academic freedom" and constitutes an intricate process of judicial administration of such schools and colleges, contrary to the Constitution and Statutes of Alabama and contrary to the Constitution of the United States and particularly the Tenth and Eleventh Amendments thereof, and in violation of the Constitutional separation of governmental powers between the United States of America and the States, and also such separation of powers between the judicial, executive and legislative branches of the States and the United States?

5. Is Title 52, Section 61 (8), Code of Alabama (Tuition Grant Statute, No. 687 approved September 1, 1965), unconstitutional?

6. Did the lower court have the constitutional and statutory authority to enter a Uniform Decree affecting at least ninety-nine of the school districts in the State of Alabama, requiring each of them to adopt a uniform "plan of desegregation" without any evidentiary hearing by a local United States District Court, thereby denying the local school boards the right to prepare and submit a plan which is proper under local conditions to meet the constitutional requirements, in direct violation of the decisions of the Supreme Court of the United States and the decisions of all of the Courts of Appeal of the United States?

7. Did the lower court have the right to grant a mandatory injunction requiring the adoption of a "plan of desegregation" drawn and calculated to destroy the freedom of choice of all students, arbitrarily and capriciously requiring assignment of all students and teachers in every school and college without any evidentiary hearing, contrary to the decisions of the Supreme Court of

the United States and of all Courts of Appeals of the United States in many particulars, including the following:

(a) Requiring discriminatory actions by giving preference to students and teachers because of their race in violation of the Fourteenth Amendment.

(b) Requiring a mandatory annual choice by all students in every grade of the schools.

(c) Requiring in the absence of the exercise of a choice that a student "shall be assigned to the school nearest his home where space is available", and that, in assigning students to schools, "no preference shall be given to any student for prior attendance of a school".

(d) Requiring construction of schools and closing of schools for the purpose of desegregation.

(e) Requiring without any evidentiary hearing local expenditures for "physical facilities, equipment, services, courses of instruction and instructional materials" regardless of the ability of either local authorities or state authorities to finance such actions?

8. Did the lower court have the right to enter a Decree contrary to the action of the Congress of the United States under Section 5 of the Fourteenth Amendment providing that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article", such Decree violating the Congressional definition of "discrimination" as applied to the public schools contained in Public Law 88-352 (Civil Rights Act of 1964), particularly Sections 401 (b), 407 (a), 410, 602, 604, 702 and 702 (j) thereof, and Section 604 of the Elementary and Secondary Education Act of 1965 as amended on October 6, 1966?

9. Did the lower court have the right to enter a Decree affecting all school districts, trade schools, junior colleges, state colleges and students thereof, in an action brought by representatives of a class consisting solely of students in the Macon County School District lacking common grounds of fact and law?

10. Did the intervention of the United States of America herein permit the Attorney General to obtain the decree here, contrary to the requirements of the statutes of the United States?

11. Did the lower court have the consitutional or statutory right to divest the United States District Courts of Alabama of their jurisdiction over the public schools, trade schools, junior colleges and colleges located within their districts?

12. Was it error fc the lower court to grant a mandatory injunction which in effect nullifies and holds void and unconstitutional the Alabama School Placement Law, Act No. 201 of the Legislature of Alabama, Regular Session 1955, enacted August 3, 1955, as amended?

13. Was it error for the lower court to deny the motion of Ernest Stone, Superintendent of Education of Alabama, to dismiss this proceeding?

6.

Due Process of Law Is Violated by the Decree Granted in This Case. The Ninety-Nine Local School Districts (the Actual Defendants Whose Rights Are Affected) Have Not Been Served with Process nor Have They Had an Opportunity to Be Heard

If the scope of relief sought in this proceeding had been limited to judgments or decrees affecting solely the rights, duties and powers of state officials, the local school officials would not have been necessary parties. In this

proceeding the Court may limit the scope of the issues and relief granted to actions materially affecting only the parties to the suit. Local school officials are not necessary parties to a suit which only affects the rights, powers and duties of a state officer. But when *their* rights, powers and duties are materially affected, such local officers are necessary, and, to that extent, indispensable parties. It is one thing to enjoin the State Superintendent of Education (or any other state official) from improperly performing his duties and powers and quite another thing to require him by mandatory injunction to force local school officials to act as he may demand. This certainly may not be done without due process of law in a proceeding in which the local officials have not had the opportunity to be heard. Their local school systems might be destroyed by orders granted in a proceeding to which they are not parties.

The relief prayed for by the Plaintiffs and Intervenors in Civil Action No. 604-E (Appellee here) would, among other things, prevent the disbursement of state funds by state officials to separate school districts dependent upon such funds for the discharge of their statutory and constitutional duties. That such school districts have an interest in the continuing flow of authorized and appropriated funds admits of no question. It is equally obvious that equity and good conscience will not tolerate a decree enjoining the disbursement of funds to a few school districts which might be made parties-Defendants while leaving unfettered the flow of funds to other school districts within the state.

The Court of Appeals of the Fifth Circuit in *Standard Oil Company* v. *Marshall*, 265 F.2d 46, stated that "the classic definition of indispensable parties is that in *Shields* v. *Barrow*, 1855, 17 How. 129; 58 U.S. 129, 15 L. Ed. 158."

Such definition by this Court, which has prevailed and is still recognized after one hundred twelve years, defines the three classes of parties to a suit as follows:

> "1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. *These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court* so that the court can proceed to a decree, and do complete and final justice, *without affecting other persons not before the court,* the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition *that its final termination may be wholly inconsistent with equity and good conscience.*"

In *State of Washington* v. *U. S.*, 87 F.2d 421, the Court of Appeals of the Ninth Circuit quoted numerous decisions of the Supreme Court of the United States including the following:

> "In Barney v. Baltimore, 73 U.S. (6 Wall.) 280, 284, 18 L. Ed. 825, it is said: 'There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case. *But if this cannot be done, it will proceed to administer such relief as may be in its power,* between the parties before it.

> And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to the jurisdiction . . .'"
>
> "In cases where there is error in nonjoinder of parties, either necessary or indispensable, the courts have fallen into common error by designating the error as 'jurisdictional'. The defect is not, properly speaking, a jurisdictional one as shown by the following quotation from *Shields* v. *Barrow*, supra, 17 How. 130, 141, 15 L. Ed. 158: 'As is observed by this court, in *Mallow* v. *Hinde*, 12 Wheat. (193) 198 (6 L. Ed. 599), when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; *we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.*' See, also, *Barney* v. *Baltimore*, supra, 6 Wall. 280, 285, 18 L. Ed. 825; *State of California* v. *Southern Pac. Co.*, supra, 157 U.S. 229, 250, 15 S. Ct. 591, 39 L. Ed. 683; *Minnesota* v. *Northern Securities Co.*, supra, 184 U.S. 199, 236, 22 S. Ct. 308, 46 L. Ed. 499; *Bogart* v. *Southern Pac. Co.*, supra, 228 U.S. 137, 146, 33 S. Ct. 497, 57 L. Ed. 768."

Certainly this Court may "proceed to administer such relief as may be in its power, between the *parties before it*" but just as surely *"no Court can adjudicate directly upon a person's right without the party being either actually or constructively before the Court."*

The extent to which these ninety-nine school districts have had their rights affected without due process of law

prior to adjudication is demonstrated by the following extracts from the order of the three-judge court dated July 28, 1967:

> Under the facts now presented, this Court now specifically finds and concludes that the City of Lanett school system and the other 98 school systems listed in the order of this Court of March 22, 1967, were, when said order was entered and served, made "subject to a final order of a court of the United States for the desegregation" of such school systems within the meaning of 45 C.F.R. 80.4(c) . . . (App. p. A298)
>
> To permit the Department of Health, Education and Welfare to terminate funds to school systems under the order of this Court would be an abdication on the part of the Court of its authority to require compliance with a court order. There can be no administrative supervision or review of a judicial decree. There must be judicial approval of the termination of federal financial assistance when a school system is operating under a court order. The temporary restraining order entered in this case on July 14, 1967, will be enlarged into a preliminary injunction. (App. p. A303)

7.

The Appellant State Officials Do Not Possess the Statutory Authority to Control the Actions of Local School Boards to the Extent Required by the Mandamus (or Mandatory Injunction) Granted Below

These defendant state officials completely lack the power under the Alabama Constitution and statutes to take the actions which would be required of them by the plaintiffs and by the decree submitted to the Court for consideration. The basic framework of the actions attempted to be required by injunction, either directly or by the withholding of state funds, consists of:

1. The placement, assignment and transfer of pupils from one public school to another public school within a city or county school system.

2. The transfer or reassignment of teachers from one public school to another public school within a city or county system.

3. The closing of public schools within a city or county school system.

4. The expenditure of funds in the nature of grants-in-aid to students in the public school system.

5. The furnishing, direction and control of the transportation of pupils within any city or county school system.

Each and every one of the above powers and duties has been expressly held by the Supreme Court of Alabama to be vested in "the local school boards of education". The Supreme Court of Alabama has specifically held that the defendants in these causes have no authority in relation to such matters.

The responsibility for public education in Alabama has traditionally centered at the local level. Title 52, Section 62, Code of Alabama 1940, provides as follows:

> The general administration and supervision of the public schools of the educational interests of each county, with the exception of cities having a city board of education, shall be vested in the county board of education.

The philosophy that the education of children is a community concern and should be directed and controlled at the local level is clearly set forth in the various statutes contained in Title 52 of the Alabama Code.

Section 71 provides that real estate and other property of public schools is vested in, and held in trust by, the County Boards of Education which shall maintain a uniform and effective system of public schools throughout their respective counties. Section 73 provides that "the County Boards of Education shall determine, with and on the advice of the County Superintendent of Education, the educational policy of the County, and shall prescribe rules and regulations for the control and management of the schools." Section 74 provides that,

> . . . the County Board of Education shall exercise through its executive officers, the County Superintendent of Education and his professional assistants, control and supervision of the public school system of the County. The Board shall consult and advise through its executives and his professional assistants, with school trustees, principals, teachers and interested citizens, and shall seek in every way to promote the interests of the schools under its jurisdiction.

Section 76 provides that "the County Board of Education shall consolidate schools whenever in its judgment it is practicable, and arrange, if necessary, for the transportation of pupils to and from such consolidated schools. . . ." Section 82 sets forth the procedure which must be followed by County and City Boards of Education in order to effect the consolidation of City and County School Systems. Among other requirements, this section provides for a referendum to be held in the affected county. Section 86 provides that the County Board of Education shall appoint all principals, teachers and assistants authorized by the Board. Section 87 provides that the County Board shall prescribe the courses of study for the schools under its jurisdiction. Section 61(4), et seq., confers on the local boards the sole responsibility and authority for

assignment and transfer of students and teachers, and such boards are constituted judicial tribunals for this purpose.

It is true that the State Board of Education is granted by statute "general control and supervision" over the public schools. Title 52, Section 14. However, as the Alabama Supreme Court emphatically pointed out in Opinion of the Justices, copy of which is attached to the application for stay, this general supervisory authority does not supersede or impair the specific responsibilities conferred upon the local boards by statute.

A survey of the statutes granting specific responsibilities to the State Board of Education reveals that in practical effect it is primarily a coordinating agency whose primary functions consist of providing technical services for the local board and rendering informational advice and assistance when requested. The State Board establishes policies binding on the local systems only in instances specifically defined and delineated by statute, such as the establishment of minimum standards governing sanitation, construction sites, courses of study, grading of schools, and teacher training. Title 52, Section 14, et seq. The State Board is responsible generally for the administration of the minimum program fund, but such responsibility consists primarily of carrying out a highly detailed and inflexible formula established by the legislature for the the distribution of funds to the various local systems, Title 52, Section 208, et seq. The responsibility for meeting the requisite criteria for becoming eligible for participation in the fund rests with each local board.

Referring to the opinion of the Supreme Court of Alabama, attached hereto as Appendix 20, this three-judge court said (231 F. Supp. 743, 755) in the former appearance of this case:

> This court recognizes the authority of the Supreme Court of Alabama when it interprets the Alabama law, as it informally did in these advisory opinions.

Although the Court referred to "these informal opinions", the opinion was rendered by the Supreme Court of Alabama by authority of and in accordance with the statute of the State and hence, as recognized, is valid and binding. Thereafter a similar question was before the Supreme Court of the United States in *Shuttlesworth* v. *Birmingham*, 15 L. Ed. 2d 176, decided on November 15, 1965. Mr. Justice Stewart delivered the opinion of the Supreme Court and referred to the construction of an Alabama statute by the Alabama courts and said:

> It is our duty, of course, to accept this state judicial construction of the ordinance. Winters v. New York, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665; United States v. Burnison, 339 U.S. 87, 94 L. Ed. 675, 70 S. Ct. 503; Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U.S. 495, 92 L. Ed. 99, 68 S. Ct. 167.

There is no need to multiply authorities but in *Winters*, thus cited as supporting the statement of law contained in *Shuttlesworth*, the Supreme Court of the United States referred to the construction of a state statute by the Court of Appeals of New York and then said:

> This construction fixes the meaning of the statute for this case. *The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature.* Hebert v. Louisiana, 272 U.S. 312, 317, 71 L. Ed. 270, 273, 47 S. Ct. 103, 48 A.L.R. 1102; Skiriotes v. Florida, 313 U.S. 69, 79, 85 L. Ed. 1193, 1201, 61 S. Ct. 924.

A detailed comparison of the decree of this Court and the opinion of the Supreme Court of Alabama at-

tached as Appendix 20 demonstrates that the injunction granted in the decree here cannot be maintained unless this Court holds that the State Superintendent of Education or the other defendants possess authority expressly negatived by the Constitution and the statutes of the State of Alabama as construed by the Supreme Court thereof.

8.

The Decree and Opinion Herein Violate the Constitution of the United States, the Decisions of the Supreme Court of the United States and of the Courts of Appeals of All of the Circuits (Including the Fifth Circuit) with the Exception of Jefferson County

The chaos now existing in the application of the Constitution of the United States to the administration of public schools is best illustrated by the conflict between all prior cases decided by the Court of Appeals of the Fifth Circuit and *Jefferson County*. Approximately fifty prior decisions of the Fifth Circuit were in fact overruled by *Jefferson County* but we quote from several of those cases which were expressly overruled being *Avery* v. *Wichita Falls Ind. School Dist.*, 241 F.2d 230; *Borders* v. *Rippy*, 247 F.2d 268; *Cohen* v. *Public Housing Adm.*, 257 F.2d 73; *Boson* v. *Rippy*, 285 F.2d 43; *Evers* v. *Jackson Municipal Separate School Dist.*, 328 F.2d 408; *Stell* v. *Savannah-Chatham County Board of Education*, 333 F.2d 55:

Prior Decisions of the Fifth Circuit	*Jefferson County*
Avery:	*Page 4 of the slip opinion*:
The Constitution as construed in the School Segregation Cases, Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873;	The United States Constitution, as construed in *Brown*, requires public school systems to integrate students, faculties, facilities

Prior Decisions of the Fifth Circuit

Id., 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, and Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884, forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races.

Avery:

As was well said in Briggs v. Elliott, D.C.E.D.S.C., 132 F. Supp. 776, 777: ". . . Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals." Keeping that principle in mind, we cannot say that the district court abused its discretion.

Jefferson County

and activities. If *Brown I* left any doubt as to the affirmative duty of states to furnish a fully integrated education to Negroes as a class, *Brown II* resolved that doubt.

Page 39 of the slip opinion:

The portion of the opinion most quoted is pure dictum. *Briggs* did not paraphrase the law as the Supreme Court stated it in *Brown* or as the law must be stated today in the light of *Aaron* v. *Cooper*, *Rogers* v. *Paul* and *Bradley* v. *School Board*. These and other decisions compel states in this circuit to take affirmative action to reorganize their school systems by integrating the students, faculties, facilities, and activities.

Page 40 of the slip opinion:

This Court and other courts gratuitously for the most part, have often paraphrased or quoted with approval the Briggs dictum.

Prior Decisions of the Fifth Circuit	*Jefferson County*
Borders:	*Page 73 of the slip opinion*:
The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools.	The only relief approaching adequacy is the conversion of the still-functioning dual system to a unitary, non-racial system — lock, stock and barrel. If this process be "integration" according to the 1955 *Briggs* court, so be it. In 1966, this remedy is the relief commanded by *Brown*, the Constitution, the Past, the Present, and the way foreimage of the Future.
Cohen:	*Page 53 of the slip opinion*:
Neither the Fifth nor the Fourteenth Amendment operates positively to command integration of the races but only negatively to forbid governmentally enforced segregation. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233; Rippy v. Borders, 5 Cir., 1957, 250 F.2d 690, 692.	In a school system the persons capable of giving class reliefs are of course its administrators. It is they who are under the affirmative duty to take corrective action toward the goal of one integrated system.
Boson:	*Page 65 of the slip opinion*:
"The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requir-	"The defendants argue, nevertheless, that there is no constitutional mandate to remedy racial imbalance." Ball v. School City of Gary, 324 F.2d 209 (7th Cir. 1963).

Prior Decisions of the Fifth Circuit	*Jefferson County*
ing segregation on account of their race or color of children in the public schools." Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233.	But that is not the question. The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system. . . . Brown answered that question affirmatively in the context of coerced segregation.
Evers I:	*Page 38 of the slip opinion:*
This is not to say that the Fourteenth Amendment commands integration of the races in the schools, or that voluntary segregation is not legally permissible. . . . The Supreme Court did not hold otherwise in Brown v. Board of Education, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873. Its holding was that enforced racial segregation in the public schools is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. Cooper v. Aaron, 1958, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5.	The defendants contend that the Guidelines require integration, not just desegregation; that school boards have no affirmative duty to integrate. They say that in this respect the Guidelines are contrary to the provisions of the Civil Rights Act of 1964 and to constitutional intent expressed in the Act. This argument rests on nothing that the United States Supreme Court held or said in *Brown* or in any other case.
Stell:	*Page 9 of the slip opinion:*
No court has required a "compulsory racially integrated school system" to meet the constitutional mandate that there be no dis-	Less and less have courts accepted the question-begging distinction between "desegregation" and "integration" as a sanctuary for

Prior Decisions of the Fifth Circuit	*Jefferson County*
crimination on the basis of race in the operation of public schools. See Evers v. Jackson Municipal Separate School District, 5 Cir., 1964, 328 F.2d 408, and cases there cited. The interdiction is against enforced racial segregation.	school boards fleeing from their constitutional duty to establish an integrated, non-racial school system.

A comparison of the decree which was adopted in *Jefferson County* by the Fifth Circuit Court of Appeals (without any evidential hearing, without regard to local conditions and without action by any district court, pages A126 through A135, as a uniform decree to be applied throughout the Circuit) with the decree rendered in this case (pp. A1 through A23) demonstrates that they are identical in most material particulars. The slight difference in wording will have no material effect.

Also it will be noted that the opinion in this case (pp. A27 through A67) carefully skirts the express and frank position taken in *Jefferson County* overruling all previous applicable cases decided by the Fifth Circuit. Nevertheless, the three-judge court here arrives at the same result and enters what is practically the same decree.

Hence it is necessary in this Jurisdictional Statement to compare the decisions of the Courts of Appeals of other Circuits, and of other Courts, with decision of this three-judge court and the decision of the Court of Appeals of the Fifth Circuit in *Jefferson County,* all construed in pari materia. Such comparison demonstrates that confusion is "thrice confounded".

Rather than making this Jurisdictional Statement an argumentative brief, we will quote the Courts which pre-

sent our position more clearly and succinctly than we ourselves could do. The most recent decision of a Court of Appeals which is in accord with the fifty decisions of the Fifth Circuit prior to *Jefferson County* and which directly conflicts with the latter decision is that of *Brenda K. Monroe et al.* v. *Board of Commissioners, City of Jackson, Tennessee, et al.*, decided by the Court of Appeals of the Sixth Circuit on July 21, 1967, involving Appeals Nos. 17,118 and 17,119 in that Court. Therein the Sixth Circuit said the following (a complete copy of the opinion of the Court is attached as Appendix 24, pages A259 to A270):

(1) COMPULSORY INTEGRATION.

Appellants argue that the courts must now, by reconsidering the implications of the *Brown* v. *Board of Education* decisions in 347 U.S. 483 (1954) and 349 U.S. 294 (1955), and upon their own evaluation of the commands of the Fourteenth Amendment, require school authorities to take affirmative steps to eradicate that racial imbalance in their schools which is the product of the residential pattern of the Negro and white neighborhoods. The District Judge's opinion discusses pertinent authorities and concludes that the Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan. We agree with his conclusion. We have so recently expressed our like view in *Tina Deal, et al.* v. *The Cincinnati Board of Education*, 369 F.2d 55 (C.A. 6, 1966), petition for cert. filed, 35 LW 3394 (U.S. May 5, 1967) (No. 1358), that we will not here repeat Chief Judge Weick's careful exposition of the relevant law of this and other circuits. He concluded "We read *Brown* as prohibiting only enforced segregation." 369 F.2d at 60. We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long be-

fore *Brown*, whereas we consider here Tennessee schools desegregated only after and in obedience to *Brown*. We are not persuaded, however, that we should devise a mathematical rule that will impose a different and more stringent duty upon states which, prior to *Brown*, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation—this to be true even though the current problem be the same in each state.

We are asked to follow *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (C.A. 5, 1966), which seems to hold that the pre-Brown biracial states must obey a different rule than those which desegregated earlier or never did segregate. This decision decrees a dramatic writ calling for mandatory and immediate integration. In so doing, it distinguished *Bell* v. *School City of Gary, Indiana*, 324 F.2d 209 (C.A. 7, 1963), cert. den. 377 U.S. 924, on the ground that no pre-Brown de jure segregation had existed in the City of Gary, Indiana. 372 F.2d at 873. It would probably find like distinction in our *Tina Deal* decision because of Cincinnati's long ago desegregation of its schools. We, however, have applied the rule of *Tina Deal* to the schools of Tennessee. In *Mapp* v. *Board of Education*, 373 F.2d 75, 78 (C.A. 6, 1967), Judge Weick said,

> "To the extent that plaintiffs' contention is based on the assumption that the School Board is under a constitutional duty to balance the races in the school system in conformity with some mathematical formula, it is in conflict with our recent decision in *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966)."

However ugly and evil the biracial school systems appear in contemporary thinking, they were, as Jefferson, supra, concedes, de jure and were once found lawful in Plessy v. *Ferguson*, 163 U.S. 537 (1896), *and*

such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by Brown would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures of the states and the nation—U. S. Const. Art. I, Section 9, Clause 3 and Section 10, Clause 1. Neither, in our view, would such decrees comport with our current views of equal treatment before the law.

This is not to say that Tennessee school authorities can dishonestly construct or deliberately contrive a system for the purpose of perpetrating a "maximum amount" of its pre-Brown segregation. *Northcross* v. *Board of Education of City of Memphis,* 33 F.2d 661, 664 (C.A. 6, 1964). *But to the extent that United States* v. *Jefferson County Board of Education, and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in Deal, we respectfully decline to follow them.*

In *Monroe* the Sixth Circuit approved the opinion of the District Court, 244 F. Supp. 353, which construed *Goss* v. *Board of Education of Knoxville,* 373 U.S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632. The district court quoted *Goss* including the finding by this Court therein:

> This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein. But no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment.

After discussing the finding of *Goss* as to objectional one-way transfer provisions, the district court said:

> However, the Court expressly recognized that a transfer provision or policy which did not contain a racial classification and which allowed transfers as readily to a school in which the applicant would be in a racial minority as it allowed transfers to a school in which the applicant would be in a racial majority would be valid. The Court therefore did not hold that integration is a required end result of the provisions or policy. *And, as we said in our earlier opinion in this very action* (221 F. Supp., 968, 974), *it is difficult to see how it could be held that segregation resulting from purely voluntary choice could violate the Fourteenth Amendment as it would not be "state-imposed separation."* Similarly, it is difficult to see, for the same reason, how it could be held that segregation that resulted from "honestly" arrived at geographical zoning could violate the Fourteenth Amendment. We therefore conclude, as we concluded before, that the Constitution does not require integration and that it only requires the abolition of compulsory segregation based on race.

Turning from the federal courts to the State Supreme Courts we find the case of *James Tomex et al.* v. *Board of Education, Waukegan City School District*, rendered by the Supreme Court of the State of Illinois in March, 1967. In this case the Court said (a complete copy of the opinion of the Court being attached as Appendix 26, pages A273 to A287):

> Section 10—21.3 of the Illinois School Code (Ill. Rev. Stat. 1965, chap. 122, par. 10—21.3), commonly called the Armstrong Act, provides in part: "As soon as practicable, and from time to time thereafter, the board shall change or revise existing units or create new units in a manner which will take into consideration the prevention of segregation and the elimi-

nation of separation of children in public schools because of color, race or nationality." Sections 10—20.11, 34—18 (7) and 34—22 of the Code have a provision similar to the quoted provision.

The principal question presented by this appeal is whether the provision requires school boards to prevent and eliminate "de facto segregation" or "racial imbalance" and whether such a requirement violates the equal protection clause of the Fourteenth Amendment and section 22 of article IV of our constitution. . . .

When this action was commenced the percentage of Caucasians and Negroes in Whittier and adjacent attendance units was as follows:

Name of School	Percentage of Caucasians	Percentage of Negroes
Whittier	15%	85%
Clearview	100%	0%
Glen Flora	98%	2%
Glenwood	100%	0%
Hyde Park	100%	0%

. . . Under the court's decree, the distribution of Caucasian and Negro children in the Whittier and surrounding attendance units is as follows:

Name of School	Percentage of Caucasians	Percentage of Negroes
Whittier	57.4%	42.6%
Clearview	100 %	0 %
Glen Flora	83.0%	17.0%
Glenwood	83.6%	16.4%
Hyde Park	79.9%	20.1%

. . . We hold that the apparent purpose of the Armstrong Act is that school boards shall as soon as practicable eliminate racial imbalance. . . .

Racial discrimination is, of course, the act of making distinctions based on race. A reading of *Brown II* indicates that the principle announced in *Brown I* was that a distinction or classification based on race is arbitrary, capricious and unreasonable. It would seem to follow that any law containing a racial classification is arbitrary and unreasonable and violates the equal-protection clause of the Fourteenth Amendment. . . .

Plaintiffs are quick to point out that the issue here, as contrasted with the cases above cited, is not whether the Fourteenth Amendment requires State authorities to correct racial imbalance in its schools. Rather, they assert, the question is whether the Fourteenth Amendment *prohibits* State authorities from correcting racial imbalance. . . .

As we have indicated, several States have again entered the field of racial classification in education albeit for what they now consider a proper governmental goal. As one commentator has pointed out, "This is exactly what the plaintiffs' attorneys urged the Supreme Court to prohibit in the *Brown* case, and for good reason. Although today a court might rule that the state is required to consider race in a benign way, tomorrow this might well prove a precedent for a much less happy result. Moreover, even today it is not easy to decide whether a given racial classification is benign." Kaplan, Segregation Litigation and the Schools—Part II: The General Northern Problem, 58 Nw. U. L. Rev. 157, 188 (1963). . . .

While the Act does not use the terms "racial imbalance" or "de facto segregation" we feel that the purpose of the Act is to eliminate racial imbalance. This raises a question of when a school is racially imbalanced. Here, the trial judge felt Whittier was racially imbalanced when it had 85% Negroes and was not when it had 42.6% Negroes. But the legislature has not indicated to the school boards what constitutes a racially imbalanced school. . . .

> If the purpose of the Armstrong Act is to eliminate racial imbalance, it would appear to be for integration qua integration without any determination that it would promote equal educational opportunities. . . .
>
> The dissent to this opinion asserts that we have declared the Armstrong Act unconstitutional because we found the General Assembly was motivated by an improper purpose. This is simply not true and is actually completely contrary to our holding. Our holding is that programs to create equal educational opportunities must under the equal protection clause of the Fourteenth Amendment and under section 22 of Article IV of our constitution be administered without regard to race. This is the *neutral* application of the statement in *Brown II*—"the fundamental principle (is) that racial discrimination in public education is unconstitutional." Just as the neutral principle of free speech protects speech which may or may not be socially desirable, so also does the principle prohibiting racial discrimination in public education prevent this type of legislation regardless of the General Assembly's purpose. . . .
>
> We hold that the Armstrong Act is unconstitutional. The judgment of the circuit court of Lake County is accordingly reversed.

The conflict between the Fifth Circuit in *Jefferson County* and this three-judge court on the one hand and the Courts of Appeals of the other Circuits and the State Courts on the other hand includes not only a clash of basic constitutional concepts but also the practical application thereof to the administration of schools.

In *Bradley* v. *School Board of Richmond,* 345 F.2d 310, vacated and remanded on other grounds, 382 U.S. 103 (1965), a majority of the Fourth Circuit sitting en banc approved without qualification a freedom-of-choice plan

similar to many of those submitted by the forty-eight school systems rejected here by order dated April 17, 1967. In reply to the appellants' insistence that the plan there considered was unconstitutional because the preferences of Negro parents for predominantly Negro schools "result(ed) in the continuance of some schools attended only by Negroes," the Fourth Circuit said:

> It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. . . . There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous. . . . There is no hint (in *Brown*) of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that such individual's freedom of choice may be affected by the equal rights of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend.

To their contention that a freedom of choice plan is adequate only if it is combined with geographic assignments based on residence, as provided in Section I (d) of the decree here (pp. A14-A15), the Fourth Circuit concluded:

> We find, however, that an underlying geographic plan is not a prerequisite to the validity of a freedom of choice plan. A system of free transfer is an acceptable device for achieving a legal desegregation of schools. Its acceptability is not dependent upon the concurrent use of some other device which also might.

> be adequate. . . . Imposed discrimination is eliminated as readily by a plan under which each pupil initially assigns himself as he pleases as by a plan under which he is involuntarily assigned on a geographic basis. . . . The other means (in addition to geographic zoning) of abolishing the dual zone system was to do away with zones completely. From the point of view of the ultimate objective of eliminating the illegal dual zoning, dezoning seems the obvious equivalent of rezoning and, administratively, far easier of accomplishment when the School Board intends ultimate operation to be founded upon the free choice of the pupils.

As late as June, 1967, the Fourth Circuit considered similar problems in *Bowman* v. *County School Board of Charles City County, Virginia*, (June 12, 1967—not yet reported), and in *Green* v. *County School Board of New Kent County, Virginia*, (decided June 12, 1967—not yet reported), which reaffirms its position as follows:

> In this school case, the Negro plaintiffs attack, as a deprivation of their constitutional rights, a "freedom of choice" plan, under which each Negro pupil has an acknowledged, "unrestricted right" to attend any school in the system he wishes. They contend that compulsive assignment to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention. . . .
>
> If each pupil, each year, attends the school of his choice, the constitution does not require that he be deprived of his choice unless its exercise is not free. This we have held and we adhere to our holdings.

The storm engendered by the Fifth Circuit and this three-judge court departing from accepted precedence is further illustrated by the decision of the Eighth Circuit in *Clark* v. *Board of Education of Little Rock School Dis-*

trict, 369 F.2d 661 (8th Cir., 1966), rehearing denied 374 F.2d 569 (8th Cir., 1967). The assignment features of the plan approved by the Eighth Circuit in *Clark* were the same as those in the Fourth Circuit decisions: an unrestricted freedom-of-choice plan with no provision for geographic assignments on failure to make a choice. The court rejected the contention that the constitutionality of a plan depends upon whether it "works" in achieving numerical results, saying:

> Thus, they (plaintiffs) argue that the "freedom of choice" plan is not succeeding in the integration of the schools.
>
> Though the board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. . . . The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. . . :
>
> In short, the constitution does not require a school system to force a mixing of the races in schools according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional.

Regarding the validity in general of a freedom-of-choice plan of the sort which petitioners urged the Fifth Circuit to allow, the Eighth Circuit concluded:

> Notwithstanding the H. E. W. Guidelines and the recent opinion of the Fifth Circuit (in *Jefferson County*), when a student is given a well publicized annual right to enter the school of his choice, coupled with periodic mandatory choices as set forth in the Board's amended plan, we can find on the face of it

no unconstitutional state action. We find no state act that results in discrimination against Negroes (374 F.2d at 571). . . .

> Therefore, if in fact all the students wishing to transfer were fully accommodated, the constitution would unquestionably be satisfied. . . . (374 F.2d at 572). . . .
>
> If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to the classrooms. We find no unlawful discrimination in the giving of students a free choice of schools (369 F.2d at 666).

With respect to the contention that a free choice plan must provide for a mandatory annual choice with geographic assignments on failure to choose, the Eighth Circuit stated:

> They are afforded an annual *right* to transfer schools if they so desire. The failure to exercise this right does not result in the student being assigned to a school on the basis of race. Rather, the student is assigned to the school he is presently attending, by reason of a choice originally exercised solely by the student (369 F.2d at 668). . . .
>
> On its face, we believe that the plan, as approved by us, is proper and constitutional, and appellants have made no showing that this non-mandatory freedom of choice plan to laterally transfer schools had infringed their constitutional rights (374 F.2d at 571).

Although at first glance it might appear that the Tenth Circuit is at variance with the above cases in *Board of Education of the Oklahoma City Public Schools* v. *Dowell*, ... F.2d ..... (10th Cir., January 23, 1967), *cert. denied*, 25 U.S.L. Week 3418 (U.S. May 29, 1967), this decision was

bottomed upon an express finding of bad faith by the school board involved. On the other hand, the Tenth Circuit reaffirmed its decision in *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (1964), in which the court had said:

> Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend schools with them.

9.

The Requirements of the Decree Here, the HEW Guidelines and the Decree in Jefferson County Are in Direct Violation of the "Mandate of Congress" and the "Voice of the Nation" As Expressed in the Civil Rights Act of 1964

For the convenience of the Court we repeat here the detailed requirements of the decree which require action by the State Superintendent of Education of Alabama contrary to the Constitution and Statutes thereof. These requirements are directly contrary to the prohibitions contained in the Civil Rights Act of 1964. These include the following:

(a) The placement, assignment and transfer of students.

(b) The transfer or reassignment of teachers.

(c) The closing of public schools.

(d) The control of expenditure of funds in the nature of grants-in-aid to students in the public school system.

(e) The furnishing, direction and control of the transportation of pupils.

(f) The location and construction of school facilities.

These requirements of the decree violate the express provisions of the Civil Rights Act of 1964. If jurisdiction is noted herein, in our brief submitted to the Court we will point out the legislative history supporting our position. However, for the present purposes, we simply quote the provisions of the Civil Rights Act of 1964 which are violated by the decree:

Section 401 (b): ". . . but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Section 407 (a): ". . . provided that nothing herein shall empower *any official or court of the United States* to issue any order seeking to achieve a racial balance in any school by *requiring the transportation of pupils* from one school to another or one school district to another in order to achieve such racial balance *or otherwise enlarge the existing power of the court* to insure compliance with constitutional standards."

Section 410: *"Nothing in this title shall prohibit classification and assignment* for reasons other than race, color, religion, or national origin"

Section 604: ". . . nothing contained in this Title shall be construed to authorize action under this Title by any Department or Agency with respect to any employment practice of any employer."

Section 701 (*b*) of Title VII—Equal Employment Opportunity—specifically excepts: ". . . a state or political subdivision thereof."

Section 702: "This title shall not apply to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

10.

The Judicial Compulsion Without Due Process of Law

The attorneys for the United States of America (the only actively participating Plaintiff, as Intervenor, and the only actual appellee here) are now prosecuting this suit against state officials of Alabama as the conduit of funds. However, this is actually a suit against ninety-nine school districts, none of which were parties to the suit when it was tried, when volumnious evidence was introduced, many depositions taken and copies of extensive records placed in evidence. The officials of these school districts had no opportunity for their attorneys to cross-examine a single witness, to introduce any evidence or otherwise to participate in the proceeding.

Although this Court can have no jurisdiction over any of the school districts located in either the Northern District of Alabama or the Southern District of Alabama (and questionable venue of those not located in the Division of the Middle Dist. ict in which this court was constituted), it has used its judicial eminence and judicial power to require actions by every school district in the State of Alabama, with the exception of the Macon County Board of Education and the other school districts already under court order.

"The meat in the coconut" is continued in the following extract from the decree dated March 22, 1967 (pp. A7-A8):

> The State Superintendent of Education shall notify the following school systems that they are required to adopt a desegregation plan for all grades commencing with the 1967-68 school year that meets the standards embodied in the plan attached to this decree and designated as Exhibit "A":

Alexander City	Auburn	Andalusia
Autauga County	Anniston	Baldwin County
Athens	Bibb County	Attalla
Fort Payne	Blount County	Franklin County
Brewton	Geneva County	Butler County
Greene County	Calhoun County	Henry County
Carbon Hill	Houston County	Chambers County
Jackson County	Cherokee County	Jacksonville
Chilton County	Jasper	Clarke County
Lamar County	Lanett	Clay County
Cleburne County	Lauderdale County	Coffee County
Lee County	Colbert County	Limestone County
Conecuh County	Linden	Coosa County
Marengo County	Covington County	Marion
Cullman	Marion County	Cullman County
Marshall County	Dale County	Monroe County
Daleville	Morgan County	Dallas County
Mountain Brook	Decatur	Muscle Shoals
DeKalb County	Oneonta	Dempolis
Opelika	Dothan	Opp
Elba	Ozark	Elmore County
Phenix City	Enterprise	Pickens County
Escambia County	Piedmont	Etowah County
Pike County	Eufaula	Randolph County
Fayette County	Roanoke	Florala
Russell County	Florence	Tallassee

Russellville	Tarrant	St. Clair County
Thomasville	Scottsboro	Troy
Selma	Tuscaloosa	Sheffield
Tuscaloosa County	Shelby County	Tuscumbia
Sumter County	Walker County	Sylacauga
Washington County	Talladega	Winfield
Talladega County	Winston County	Tallapoosa County

The State Superintendent of Education shall inform these local school systems that the desegregation plan is to be adopted within 20 days from the entry of this decree; and within 25 days from the entry of this decree the State Superintendent of Education shall submit a report to this Court and to all parties informing them of the action taken by him to discharge this obligation and the results of that action.

Thereafter the use of judicial compulsion without due process of law was continued by order of the three-judge court dated April 24, 1967 appearing as Appendix 10 (pp. A175-A179) which included the following:

It is FURTHER ORDERED that the defendant Ernest Stone, as State Superintendent of Education, forthwith notify each of the following school systems that the desegregation plan which such system has adopted for all grades commencing with the 1967-68 school year and which was submitted to this Court by the State Superintendent on April 17, 1967, fails to meet the standards embodied in the plan attached as Exhibit "A" to the decree of March 22, 1967, and that a plan meeting such standards should be adopted and submitted to the State Superintendent:

Andalusia	Franklin County	Athens
Geneva County	Attalla	Greene County
Brewton	Henry County	Butler County
Houston County	Carbon Hill	Jackson County
Cherokee County	Jasper	Chilton County

Lauderdale County	Clarke County	Limestone County
Clay County	Linden	Colbert County
Marengo County	Conecuh County	Marion City
Covington County	Marion County	Dale County
Morgan County	Dallas County	Muscle Shoals
DeKalb County	Piedmont	Demopolis
Scottsboro	Etowah County	Selma
Eufaula	Shelby County	Florala
Talladega City	Florence	Tallapoosa County
Tarrant	Tuscaloosa City	Thomasville
Tuscaloosa County	Troy	Tuscumbia

and, more specifically, advising said school systems that their desegregation plans should be revised in the following regards:

> Those of the above-named systems that have patterned their plans upon the model attached to the Court's decree but have omitted from their plans any of the provisions of the Court's decree or have changed any of the provisions of the Court's decree shall revise their plans to include all provisions of the Court's decree without material change except where specific variations from the model plan are required by circumstances peculiar to the particular school system making such change. If any such changes are retained in a plan as amended, the school system should set forth the particular justification for the change.

It was said long ago that "Coming events cast their shadows before". A reading of the decree and even the opinion here does not reveal the shadows inherent therein. However, even in this short time, the shadows are lengthening. The decree appealed from and its companion opinion lay a foundation to support every method of forceable integration foreshadowed by *Jefferson County*. This is not all.

The closing of certain grades of schools, the closing of entire schools, the employment of every artifice devised by the Commission on Civil Rights, the United States Commission of Education and the Department of Justice has already begun. For the convenience of the Court we quote from order entered by the three-judge court on June 14, 1967 (pp. A236-A237).

NOW THEREFORE IT IS ORDERED:

1. The Marion County Board of Education, Earl Hampton, Chairman, Lee Hightower, A. J. Wood, Carl Byrd, and Robert Hester, members of the Marion County Board of Education, and Estes Hudson, Superintendent of Schools of Marion County, together with their officers, agents, employees, successors and all persons in active concert or participation with them, are enjoined to:

(a) adopt a desegregation plan for the Marion County School System in the form attached as Exhibit "A" to this Court's decree of March 22, 1967, and to fully carry out such plan;

(b) *close all grades of the Guin High School* prior to the start of the 1967-68 school year and assign each teacher now employed at the Guin High School to other schools in the Marion County School System in a manner to effect the desegregation of faculties in the system;

(c) *discontinue grades 10, 11 and 12* at the Ada Hanna High School prior to the beginning of the 1967-68 school year;

(d) provide each student who has heretofore chosen to attend any grade in the Guin High School or any of grades 10 through 12 in the Ada Hanna High School for the 1967-68 school year with an additional 15-day choice period within which to choose another school in the Marion County School System;

(e) formulate a plan by which, commencing with the 1968-69 school year, *grades 7 through 9 will be offered at no more than one of the following three schools: Byrd, Ada Hanna and Gravel Springs;* and

(f) serve upon the plaintiffs and the United States and submit to the Court, within 30 days of the date of this order, a report which shall describe all steps taken to implement paragraphs 1(a) through (e) above, and the results thereof.

In the same order the court required the officials of the Marengo County School System to close the Dayton, Varner, Glover and Exmoor schools prior to the commencement of the 1967-68 school year and that they close the Taylor, St. Johns and Jones Chapel Schools commencing with the 1968-69 year, and to close certain other schools named in the order as soon as financially feasible. The students in these schools will necessarily be assigned to other schools.

Neither the United States Commissioner of Education, the Department of Justice nor the civil rights organizations with which they cooperate move in a vacuum. *In order to see the end of the road,* it is necessary that the pieces of the puzzle be recognized and put together. Only then does the full picture emerge.

Fifteen procedures are detailed in the proposed form of the "Equal Educational Opportunity Act of 1967" as hereinafter quoted. They are clarified by the Report of the United States Commission on Civil Rights which was released on February 20, 1967. The policy of the Civil Rights organizations (supported by the Department of Justice) has been a course of gradualism. Initially certain positions are taken and words used; then these positions are slightly changed and the meanings of the words used are also changed; then different words are substi-

tuted and the final result is quite different from that contemplated in the decisions of the courts obtained under the original advocacy of these Civil Rights organizations and the Department of Justice.

This is demonstrated by the means and methods intended to be utilized in the proposed "Equal Educational Opportunity Act of 1967". It is further illustrated by the terms used and the application thereof in the majority opinion in *Jefferson County* and the decree and parts of the opinion in this case as accentuated by the above Report of the United States Commission on Civil Rights.

The proposed recommendations to Congress to be included in the Equal Educational Opportunity Act of 1967 were placed in the Congressional Record on or about September 24, 1966, by Congressman Fino. Such recommendations include the following procedures to obtain the "desegregation" or "integration" of schools:

(1) Comprehensive, district-wide rezoning of school attendance areas to obtain maximum heterogeneity.

(2) Pairing, grouping or clustering of adjacent Negro and white schools with a division by grade level in two or more residential areas.

(3) Reorganization of the use of schools; reorganizing the grades of a school; converting schools to other uses; closing schools; changing feeder patterns; grade pattern reorganization.

(4) Careful site selection to locate new schools so as to maximize integration of residentially segregated student populations.

(5) Increased busing from overcrowded to underutilized schools.

(6) Development of "magnet" high schools, each specializing in a different subject area with enrollment

open to the entire school district on the basis of interest rather than ability.

(7) Development of supplemental educational centers, comprehensive community schools and shared time programs to draw district-wide enrollment as well as participation from private and parochial schools.

(8) Open enrollment, voluntary enrollment and free transfers.

(9) Creation of metropolitan school districts to include urban and suburban areas.

(10) Suburban-Inner City pupil exchanges.

(11) In-class pupil grouping to avoid racial separation, development of up-graded primary classes, remedial and compensatory programs within the framework of regular classroom structure.

(12) In-service training for teachers and other school personnel; employment of specialists to advise school personnel, parents, children and the public on problems of desegregation; improving guidance and counseling services.

(13) Development of new curricular materials, particularly those including proper representation of racial and religious minorities.

(14) Teacher assignment to assure faculty integration at all schools.

(15) Improvement of recruitment and advancement of minority group teachers who are motivated to teach in ghetto schools and in transitional programs.

Harold Howe, II, United States Commissioner of Education, testified under oath (pages 192 to 193 of his deposition in this case) as follows:

Q. However, Mr. Howe, would you testify to the Court that the United States Office of Education does

not intend to participate in the preparation or recommend legislation generally to this effect?

A. No, I would not testify to the Court in that regard because it seems to me sometime in the future, the Office of Education might like to make available Federal support to local communities which wish to use that support for these purposes, the possibility of developing such activities on local decisions. Isn't that Congressman Fino's introduction?

Q. Yes, it is.

A. I thought it was.

The Report of the United States Commission on Civil Rights released on February 20, 1967, contains a discussion of "School Desegregation: Extent and Techniques" at page 140 et seq. Such Report points to the *end of the road* as contemplated by the parties to this suit, even though many actions are presently disguised or lightly touched upon in the decree in this case. The following are of particular interest:

1. There never has been any intention by the civil rights protagonists and the Department of Justice to distinguish between "de facto" and "de jure" segregation. The intention is to accomplish complete, absolute and overall integration to a *racial balance* regardless of the use of such terms temporarily as an expedient to bring about the final end. An illustration of this appears on page 141 of the Report as follows:

> Smaller communities have used a variety of techniques to accomplish desegregation, but a common element is the *enlargement of attendance areas* to overcome the obstacle of residential segregation. Among these devices are *"pairing", the establishment of "central" schools,* and *the closing of a majority-Negro school and dispersal of its students among other schools in the community.*

> *Pairing involves merging the attendance areas of two or more schools* serving the same grades *to achieve better racial balance.*

2. The reference in the majority opinion in *Jefferson County* to the "Princeton Plan" and actions taken by the three-judge court subsequent to the decree are clarified by the Commission's Report on page 142 thereof as follows:

> School pairing was introduced in 1948 in Princeton, N. J., a community which had been served by two elementary schools, one nearly all-white and the other Negro. *The school system merged the attendance areas of the two schools and assigned all students in grades K-5 to one school and all students in the remaining grades, grades 6-8, to the other.* As a result of the pairing, each of Princeton's elementary schools became majority-white.

3. The complete disregard of proper educational bases in order to bring about integration is illustrated by the reference made on page 142 of the Commission's Report to actions taken in Princeton, New Jersey, and Greenburgh, New York.

> The Princeton and Greenburgh examples show that in very small communities pairing may result in the establishment of central schools whereby one school building becomes a central facility for several grades servicing the entire school district. In communities which have a larger number of schools, central schools also can be established by making the whole district a single attendance zone for all students in one or two grades. In this way, the grades served by the central school are fully desegregated and resegregation that might otherwise occur through shifts in racial residential patterns within the community is precluded.

4. Another method which may be utilized in this case and *Jefferson County* under the respective decrees is discussed on pages 143 et seq. of the Report under the heading "School Closing". This describes another means of obtaining *racial balance* in schools and states, "Another means of desegregating schools by enlarging attendance areas is the closing of a particular school and the dispersal of the students among the remaining schools." Reference is then made to action taken in White Plains, New York, and the following statement is made:

> Another means of desegregating schools by enlarging attendance areas is the closing of a particular school and the dispersal of its students among the remaining schools.
>
> Thus there have been several examples of successful school desegregation in smaller communities. A variety of devices has been used, individually or in combination, but in each case a major element has been the enlargement of the attendance areas and a return to the older concept of the community school, where a more representative cross section of a city's children attended school together.
>
> Efforts to *reduce racial imbalance* in most big cities fall generally into three categories: (1) those which seek to *reduce imbalance* without altering existing attendance areas; (2) those which alter or enlarge attendance areas; and, (3) those which involve cooperation between suburban and central city school jurisdictions.
>
> A number of big city school systems have attempted to *reduce racial imbalance* without altering established attendance areas. Devices used include open enrollment and busing.
>
> Some school systems have sought to *relieve racial imbalance* by transporting Negro children from their normal attendance areas to predominantly white schools in other parts of the city.

5. The intention of federal authorities to control textbooks or "educational materials" is demonstrated by the statement on page 159 of the Report, which is as follows:

> Another contribution to interracial understanding has been *the introduction of multiracial curriculum materials*. Integrated teaching materials often are used in newly desegregated schools. For example, in Syracuse, an integrated basic reader is used in all elementary schools. In addition, the history of Negro Americans has been incorporated into the regular curriculum for the 1966-67 school year at all grade levels. The Berkeley schools have published a book based on the experiences of minority children participating in an all-day field trip. In other school systems teachers developed their own biracial materials when the school system did not provide such materials or where, though provided by the system, *the materials were judged inadequate.*

6. Another expedient which will be required is that of the maintenance of "magnet schools" as set forth on page 165 of the Commission's Report as follows:

> Magnet schools which offer specialized courses designed to attract white as well as Negro students constitute a variation of the specialized high schools found in many of the Nation's cities, such as Bronx Science in New York and Boston Latin in Boston.
>
> Philadelphia has begun a program providing for magnet schools, financed in part with Federal funds. When fully implemented, three senior high schools will have special academic programs. Each school will have one area of specialization: commerce and business, space and aeronautical science, or government and human service.
>
> In addition, two desegregated middle schools serving grades 5 through 8 have been proposed; each will stress individualized instructions, innovations in teaching, and the flexible grouping of students. Four ele-

mentary schools will have intensive programs in reading and science, again stressing individual attention for students. School officials view the middle and elementary magnet schools as *a means of retaining a racial balance* in the student population by providing superior education.

7. Another requirement which will be developed under the decree here, *Jefferson County* and the HEW Guidelines or otherwise is that of "educational complexes". A full discussion appears on page 166 of the Report, the basic approach being as follows:

> Proposals for education complexes would broaden attendance areas by grouping existing schools and consolidating their attendance zones. The clusters might then draw *a more racially and socially heterogeneous student body*. Specialized teachers and facilities could be made available to more students.
>
> Each complex would consist of two to eight elementary schools, all feeding one to three middle or junior high schools. Complexes might be arranged so that all elementary schools would be within approximately 20 minutes *by bus* from each other.

8. *Another basis of obtaining racial balance* is that of the use of "educational parks". This is discussed on pages 167 et seq. of the Report, the most important basic approaches being stated as follows:

> Education park proposals thus far generally contemplate a grouping of several racially desegregated schools serving a student population which may range from 5,000 to 30,000. The proposals vary with respect to such factors as appropriate size, grade organization, and population to be served.
>
> One plan, appropriate for smaller cities, would assemble on one campus all schools—elementary, junior, and senior high—and all students in the community. Another proposed form of organization for larger cities

would be *to assemble in one park all of the school facilities at a particular level*—for example, all of the middle schools or high schools. Other plans for larger cities contemplate a park which would be of comparable size—assembling two or three elementary, junior, and senior high schools—but which would not serve the entire city. The most comprehensive type of proposal for large cities would establish several parks, each serving a different section of a city or a metropolitan area.

9. The true intent concerning the busing or transportation of students under these decrees and the HEW Guidelines is discussed on pages 180 et seq. of the Report of the United States Commission on Civil Rights mentioned above. The basic approach is set forth on such pages, including the following:

> Another aspect of the feasibility of education parks involves the *increased need to transport children* which would result from the enlarged attendance areas.
>
> The study revealed there are many locations in the area where Negroes and suburban whites could attend education parks together with relatively little travel time. The report indicated that travel time for most students could be limited to less than 40 minutes.
>
> A final consideration of feasibility is the need for intergovernmental cooperation which would be entailed in education park plans that contemplate drawing students from suburban jurisdictions as well as from the city. School boards either would have to merge or share authority, staff and funds. State education agencies might have to sanction these arrangements.

The end is not yet. Only the imagination of man limits the lengths to which the Civil Rights protagonists will go to attain their desires.

11.

This Appeal Affects Not Only Ninety-Nine School Districts in Alabama but Also All of the Two Thousand and Two School Districts in the Seventeen States Now Affected by the Actions of HEW and Many Thousands of School Districts in Other States Which Will Hereafter Be Affected Hereby

The importance of this appeal cannot be minimized. It involves basic principles which will be applicable to every school district in the United States of America. If this appeal is noted and docketed by this Court, the chaos now existing in the field of public education will be resolved. Whether such determination will be consistent with the position of the appellant or consistent with the position of the appellee is immaterial at this juncture. The overwhelming importance of the consideration of this Jurisdictional Statement is the necessity that the educational authorities in all of the thousands of local school districts in the United States (whether located within the seventeen states here particularly affected or not) may be able to determine their rights, duties and responsibilities under the Constitution of the United States.

Hence, we respectfully submit that this Court should accept this Jurisdictional Statement and should consider this appeal in the absence of a motion to dismiss or affirm or, in the alternative that any motion to dismiss or affirm

should be overruled and the case placed upon the docket for full consideration by the Court.

Respectfully submitted,

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PROOF OF SERVICE

I, John C. Satterfield, Attorney, one of the attorneys for Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer of Alabama State Board of Education; James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrell, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Ward and Harold C. Martin, as members of Alabama State Board of Education, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of August, 1967, I served copies of the foregoing Jurisdictional Statement in the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with air mail postage pre-

paid to the Office of Ben Hardeman, Esq., United States Attorney for the Middle District of Alabama, at Room 302, Federal Building, Montgomery, Alabama, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C.

2. On the Plaintiffs and Plaintiff-Intervenor and Amicus Curiæ, by mailing copies, in a duly addressed envelope, with air mail postage prepaid, to the respective attorneys of record as follows:

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Washington, D. C.

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Attorney of Record for all of the Appellants herein.

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE and HENRY A. LEE, by Detroit Lee and Hattie M. Lee, their parents and next friends; PALMER SULLINS, JR., ALAN D. SULLINS and MARSHA MARIE SULLINS, by Palmer Sullins and Della D. Sullins, their parents and next friends; GERALD WARREN BILLES and HELOISE ELAINE BILLES, by I. V. Billes, their father and next friend; WILLIE M. JACKSON, JR., by Mabel H. Jackson, his mother and next friend; WILLIE B. WYATT, JR., and BRENDA J. WYATT, by Willie B. Wyatt and Thelma A. Wyatt, their parents and next friends; NELSON N. BOGGAN, JR., by Nelson Boggan, Sr., and Mamie Boggan, his parents and next friends; WILLIE C. JOHNSON, JR., BRENDA FAYE JOHNSON and DWIGHT W. JOHNSON, by Willie C. Johnson and Ruth Johnson, their parents and next friends, and WILLIAM H. MOORE and EDWINA M. MOORE, by L. James Moore and Edna M. Moore, their parents and next friends,
Plaintiffs

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION, MADISON DAVIS, Chairman; JOHN M. DAVIS, B. O. DUKES, F. E. GUTHRIE, and FRANCES (MRS. J. R.) RUSH, and C. A. PRUITT, Superintendent of Schools of Macon County, Alabama; LURLEEN BURNS WALLACE, in her capacity as Governor of the State of Alabama, and as President of Alabama State Board of Education; ALABAMA STATE BOARD OF EDUCATION; ERNEST STONE, Secretary and Executive Officer of Alabama State Board of Education; JAMES D. NETTLES, ED DANNELLY, MRS. CARL STRANG, FRED L. MERRELL, W. M. BECK, VICTOR P. POOLE, W. C. DAVIS, CECIL WORD and HAROLD C. MARTIN, as members of Alabama State Board of Education,
Defendants.

(Filed March 22, 1967)

Decree

It is ORDERED, ADJUDGED and DECREED that the Alabama State Board of Education, Mrs. Lurleen Burns Wallace, Governor of the State of Alabama and President of the Alabama State Board of Education, James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrell, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Word, and Rev. Harold C. Martin, members of the Alabama State Board of Education, and Ernest Stone, Executive Officer and Secretary of the Alabama State Board of Education, and Alabama State Superintendent of Education, together with their agents, servants, employees, successors in office, and all those in active concert or participation with them who receive actual notice of this decree or any of them, shall be and hereby are permanently enjoined from discriminating on the basis of race in the operation or the conduct of the public schools of Alabama or in any manner pertaining to the public schools of Alabama. As set out more particularly in the body of this decree, said defendants shall take affirmative action to disestablish all state enforced or encouraged public school segregation and to eliminate the effects of past state enforced or encouraged racial discrimination in their activities and their operation of the public school systems throughout the State.

It is further ORDERED, ADJUDGED and DECREED that:

I

School Construction and Consolidation

A. The State Superintendent of Education shall require all local school systems that have been the subject of a survey conducted by or under the auspices of the State Department of Education to submit to him, prior to the

commencement of the 1967-68 school year, all plans that have been formulated or adopted for the consolidation of any schools in their systems that had at the time of the survey, or now have, fewer students than required under the minimum-student standards of the State Department of Education.

B. The State Superintendent of Education shall continue to conduct surveys of the local school systems throughout the State, and require that those conducting the surveys shall:

1. Continue to collect and report data regarding the residence of students and the attendance at schools by race;

2. Not fail to recommend consolidation because desegregation would result;

3. Recommend, to the extent consistent with the proper operation of the school system as a whole, that consolidation shall be achieved in a manner to effect desegregation of the schools of the system;

4. Recommend, to the extent consistent with the proper operation of the school system as a whole, that the location, grades and capacity of new schools and expansions of existing school plants be such as to effect desegregation of the schools of the system.

C. Approval by the State Superintendent of Education of all sites upon which schools are to be constructed or existing facilities expanded shall not be based on any survey conducted prior to the entry of this decree, or any survey that does not accord with the standards set forth above in paragraph B.

D. Approval by the State Superintendent of Education of all sites upon which schools are to be constructed or existing facilities expanded shall be withheld if, judged in light of the capacity of existing facilities, the residence

of the students, and the alternative sites available, the construction will not, to the extent consistent with the proper operation of the school system as a whole, further the disestablishment of state enforced or encouraged public school segregation and eliminate the effects of past state enforced or encouraged racial discrimination in the State's public school system.

II

Teachers

A. The State Superintendent of Education shall develop a detailed program for assisting and encouraging faculty desegregation in the local school systems throughout the State for implementation prior to the 1967-68 school year and shall submit this program to the Court and all parties within 60 days after the entry of this Court's decree. The program should, at a minimum, establish ways in which the State Department of Education will assist local systems in recruiting, and in planning for the placing of new teachers and reassigning of old teachers on a desegregated basis so that by the fall of 1967, insofar as it is administratively feasible, no school located in a school district where students of both races are in attendance listed in Section IV of this decree will have teachers of only one race. The program should also provide for assistance in providing training which may be necessary to upgrade the qualifications of some teachers in order to facilitate desegregation of faculty. The program should provide for further progress after 1967-68 to help said local school systems stay in compliance with constitutional requirements in the area of public school desegregation.

B. Any services made available by the State Superintendent of Education to assist local school boards to locate and employ suitable teachers, or to assist teachers

to find suitable positions, shall be provided in a manner to effect faculty desegregation in the public schools throughout the State.

C. The State Superintendent of Education shall not give force or effect to that provision of Section 339 of Title 52 of the Alabama Code which requires that separate teacher institutes be held for Negro and white teachers; and he shall direct that a single, system-wide teacher institute be held in each local school system for the 1967-68 school year, and for each school year thereafter, and that such institutes be conducted in a nondiscriminatory manner.

D. The State Superintendent of Education shall conduct all in-service training programs on a desegregated basis.

E. The State Superintendent of Education shall apply certification requirements without discrimination on the basis of race, and shall not apply certification requirements, or grant provisional certificates, in a manner to perpetuate faculty segregation or to avoid faculty desegregation.

F. The State Superintendent of Education shall inform all applicants for certification that the school systems throughout the State are obliged to desegregate their faculties, and that teachers are subject to assignment in accordance with that obligation.

III

School Transportation

A. The defendant state officials shall require all local school boards listed in Section IV of this decree, prior to the commencement of the 1967-68 school year, to eliminate race as a basis for assigning students to school buses and to eliminate overlapping and duplicative bus routes based on race.

B. The defendant state officials shall require all of said local school boards, prior to the commencement of the 1967-68 school year, to establish nondiscriminatory criteria governing the availability of bus transportation to students within the school district. These criteria, at a minimum, should entitle each student to be transported to the school he attends if that school is the one nearest his residence and if that school is at least two miles from his residence.

C. The State Superintendent of Education shall require all local school boards listed in Section IV of this decree to submit to him for approval within 60 days after the entry of this decree their proposed bus routes and criteria governing the eligibility for bus transportation. The State Superintendent shall approve or disapprove the proposed routes and criteria, within 30 days of receiving them, according to the standards set forth in the preceding paragraphs A and B of this section, and, to the extent that he disapproves them, he shall notify the local systems of their deficiencies.

D. The State Superintendent of Education shall require all of said local school boards to communicate those routes and criteria he has approved to students and parents of the school districts in a readily understandable manner and substantially before the opening of the 1967-68 school year. The local school authorities shall notify parents and children, prior to the choice period, that the bus routes and criteria governing the eligibility for bus transportation are being revised and will be established on a nondiscriminatory basis.

E. Whatever technical assistance is made available by the State Superintendent for assisting said local school boards in meeting school transportation problems shall be provided in a manner to assist the local school boards to eliminate overlapping and duplicative bus routes based on

race and to formulate nondiscriminatory criteria regarding eligibility of students for transportation.

IV

Desegregation Plans for Local School Systems

The State Superintendent of Education shall notify the following school systems that they are required to adopt a desegregation plan for all grades commencing with the 1967-68 school year that meets the standards embodied in the plan attached to this decree and designated as Exhibit "A":

Alexander City
Andalusia
Anniston
Athens
Attalla
Auburn
Autauga County
Baldwin County
Bibb County
Blount County
Brewton
Butler County
Calhoun County
Carbon Hill
Chambers County
Cherokee County
Chilton County
Clarke County
Clay County
Cleburne County
Coffee County
Colbert County
Conecuh County
Coosa County
Covington County
Cullman
Cullman County'
Dale County
Daleville
Dallas County
Decatur
DeKalb County
Demopolis
Dothan
Elba
Elmore County
Enterprise
Escambia County
Etowah County
Eufaula
Fayette County
Florala
Florence
Fort Payne
Franklin County
Geneva County

Greene County
Henry County
Houston County
Jackson County
Jacksonville
Jasper
Lamar County
Lanett
Lauderdale County
Lee County
Limestone County
Linden
Marengo County
Marion
Marion County
Marshall County
Monroe County
Morgan County
Mountain Brook
Muscle Shoals
Oneonta
Opelika
Opp
Ozark
Phenix City
Pickens County
Piedmont
Pike County
Randolph County
Roanoke
Russell County
Russellville
St. Clair County
Scottsboro
Selma
Sheffield
Shelby County
Sumter County
Sylacauga
Talladega
Talladega County
Tallapoosa County
Tallassee
Tarrant
Thomasville
Troy
Tuscaloosa
Tuscaloosa County
Tuscumbia
Walker County
Washington County
Winfield
Winston County

The State Superintendent of Education shall inform these local school systems that the desegregation plan is to be adopted within 20 days from the entry of this decree, and within 25 days from the entry of this decree the State Superintendent shall submit a report to this Court and to all parties informing them of the action taken by him to discharge this obligation and the results of that action.

V

Institutions Under State Board of Education Control

No person shall be denied admission to any trade school, junior college, or state college[1] administered by the Alabama State Board of Education upon the ground of race, nor shall he be subjected to racial discrimination in connection with his application for enrollment in or his attendance at any such trade school, junior college, or state college. Dual attendance zones based on race for such trade schools, junior colleges, and state colleges shall be abolished. The State Department of Education shall direct such trade schools, junior colleges, and state colleges to recruit, hire, and assign teachers so as to desegregate faculty and to accomplish some faculty desegregation in each such trade school, junior college, and state college by September 1967.

VI

Equalization of Facilities

The State Superintendent of Education shall develop, and submit to this Court and all the parties within 120 days after the entry of this decree, a detailed program for bringing the quality of the physical facilities, equipment, services, courses of instruction, and instructional materials of schools previously maintained for Negro students up to the level in schools previously maintained for white students. This program shall eliminate those disparities reflected in different pupil-teacher ratios, survey classifications of buildings and sites, per pupil expenditures, valua-

1. The term "state college," as used herein, includes all state colleges or universities except the University of Alabama, Auburn University, University of South Alabama at Mobile, and Alabama College at Montevallo, which institutions have separate boards of trustees and are not administered by the Alabama State Board of Education.

tion of school property, library books per pupil, course offerings, accreditation, and transportation. In connection with applications for teacher units for vocational teachers or teachers of exceptional children, the State Superintendent of Education shall consider and grant those applications that satisfy educational requirements and had been submitted before the entry of this decree on behalf of schools traditionally maintained for Negro students, prior to acting upon other applications for such units.

VII

Information and Reports

A. The State Superintendent of Education shall make, at reasonable times and places, and upon reasonable notice, the following available to all parties:

1. All consolidation plans submitted to him by local school boards pursuant to the requirements of paragraph A of Section I of this decree.

2. All survey reports hereafter conducted pursuant to paragraph B of Section I of this decree.

3. All applications and records of action by the State Superintendent of Education regarding the approval or disapproval of school construction or expansion, together with all information relating to the sites, including the pertinent survey reports.

4. All documents relating to teacher institutes and to in-service training programs, including a report giving the number of teachers that attended each institute, the schools the teachers were from, and the race of the teachers.

5. All proposals of the local school boards relating to the routing of school buses and the criteria governing eligibility for bus transportation that are submitted to the State Superintendent for his approval under paragraph C of Section III of this decree, together with

a report indicating which proposals have been approved and when and how students and parents in the various school systems throughout the State were informed of these routes and criteria.

6. All records pertaining to action taken by the State Superintendent of Education with respect to applications for teacher units for teachers of exceptional children and vocational education teachers.

7. Records indicating the State Superintendent's action with respect to provisional teaching certificates, and a report indicating how applicants for certification were informed of the obligation of the local systems regarding faculty desegregation.

8. Records showing the attendance zones, bus routes, racial composition of faculty, and racial composition of student body for each trade school, junior college, and state college.

B. The State Superintendent of Education shall submit to the Clerk of this Court and serve upon all parties:

1. Within 60 days after the entry of this decree the detailed program regarding faculty desegregation required by paragraph A of Section II of this decree.

2. Within 120 days after the entry of this decree the detailed program regarding school equalization required by Section VI of this decree.

3. Within 25 days after entry of this decree, a report on the action taken by the State Superintendent of Education respecting the 99 school districts listed in Section IV of this decree, and the results of that action.

4. A report, which must be submitted by October 5 each year, setting forth the following information with respect to the local school systems listed in Section IV of this decree:

(a) The number of students by race, in each grade of each school for the current school year;

(b) The number of faculty members of each race assigned to each school for the current school year, together with the number of faculty vacancies or new positions, by school, that have arisen or have been filled by the school board since the last report; and

(c) The number of students that have requested to transfer from the schools they were assigned to, together with a description of the action taken by the local school board on such requests and the reasons therefor.

5. A report, which must be submitted on or before June 15 of each year, setting forth the following information with respect to each school system listed in Section IV of this decree:

The number of choice applications received for each grade, the number of choices granted and denied, and the reasons for all denials.

IX

Interference

The defendant state officials shall not interfere with, prevent or obstruct by any means the elimination of racial discrimination by local school officials in any school system in the State of Alabama.

X

The 1965-1966 Tuition Grant Statute

Title 52, Section 61(8), Code of Alabama (Tuition Grant Statute, No. 687, approved September 1, 1965), is hereby declared unconstitutional. The defendant state officials, their agents, employees, and successors in office

shall not approve or permit the approval or the payment of any tuition grants or grants-in-aid under the authority of this law.

It is further ORDERED that the United States submit to this Court within 30 days, and serve upon all parties, a report informing the Court whether any of the school systems listed in Section IV of this decree have failed, following the entry of this Court's decree, to adopt a satisfactory desegregation plan.

It is further ORDERED that the costs of this action be and they are hereby taxed against the defendant state officials.

It is further ORDERED that jurisdiction of this cause be and it is hereby retained.

Done, this the 22nd day of March, 1967.

/s/ Richard T. Rives
United States Circuit Judge
/s/ H. H. Grooves
United States District Judge
/s/ Frank Johnson, Jr.
United States District Judge

EXHIBIT "A"

Desegregation Plan

The ..... Board of Education will take the following affirmative action to disestablish all state enforced or encouraged public school segregation and to eliminate the effects of past state enforced or encouraged racial discrimination in the operation of the school system:

I

EXERCISE OF CHOICE

The following provisions will apply to all grades commencing with the 1967-68 school year:

A. *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this plan to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

B. *Annual Exercise of Choice.* All students, both white and Negro, will be required to exercise a free choice of schools annually.

C. *Choice Period.* The period for exercising choice will commence May 1, 1967, and end June 1, 1967, and in subsequent years will commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period will be given any preference because of the time within the period when such choice was exercised.

D. *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period will not preclude any student from exercising a choice at any time before he commences school for the year with respect to which

the choice applies, but such choice may be subordinated to the choices of students who exercised choice before the expiration of the choice period. Any student who has not exercised his choice of school within a week after school opens will be assigned to the school nearest his home where space is available under standards for determining available space which will be applied uniformly throughout the system.

E. *Public Notice.* On or within a week before the date the choice period opens, the school board will arrange for the conspicuous publication of a notice describing the provisions of this plan in the newspaper most generally circulated in the community. The text of the notice will be substantially similar to the text of the explanatory letter sent home to parents. Publication as a legal notice will not be sufficient. Copies of this notice will also be given at that time to all radio and television stations serving the community. Copies of this plan will be posted in each school in the school system and at the office of the Superintendent of Education.

F. *Mailing of Explanatory Letters and Choice Forms.* On the first day of the choice period there will be distributed an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the school board) of each student, together with a return envelope addressed to the Superintendent. The text for the explanatory letter and choice form will essentially conform to the sample letter and choice form appended to this plan.

G. *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form will be freely available to parents, students, prospective students, and the general public at each school

in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

H. *Content of Choice Form.* Each choice form will set forth the name and location of and grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of one parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, will be required or requested.

I. *Return of Choice Form.* At the option of the person completing the choice form, the choice may be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

J. *Choices Not on Official Form.* The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

K. *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices for their children under the conditions set forth in paragraph I-A of this plan and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student.

L. *Preference in Assignment.* In assigning students to schools, no preference will be given to any student for prior attendance at a school and except with the approval of the State Superintendent of Education in extraordinary circumstances, no choice will be denied for any reason other than overcrowding. In case of overcrowding at any school, preference will be given on the basis of proximity of the school to the homes of the students choosing it, without regard to race or color. Standards for determining overcrowding will be applied uniformly throughout the system.

M. *Second Choice Where First Choice Is Denied.* Any student whose choice is denied will be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student will have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

N. *Transportation.* Where transportation is generally provided, buses will be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing the school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is at least two miles from his residence. The school system will adopt non-discriminatory bus routes and criteria governing the availability of bus transportation to students, so that race will not be a basis for assigning students to school buses and overlapping and duplicative bus routes based on race will be eliminated. Prior to the choice period, parents and children will be advised that such routes and criteria will be adopted, and substantially prior to the opening of the

1967-68 school year the parents and children will be notified of the routes and criteria, in a readily understandable manner.

O. *Officials Not to Influence Choice.* At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any persons because of a choice made. If the school board employs professional guidance counselors, such persons will base their guidance and counseling on the individual student's particular personal, academic, and vocational needs. Such guidance and counseling by teachers as well as professional guidance counselors will be available to all students without regard to race or color.

P. *Protection of Persons Exercising Choice.* Within their authority, school officials are responsible for the protection of persons exercising rights under or otherwise affected by this plan. They will, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference will include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board will not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this plan. If officials of the school system are not able to provide sufficient protection, they will seek whatever assistance is necessary from other appropriate officials.

II

PROSPECTIVE STUDENTS

Each prospective new student will be required to exercise a choice of schools before or at the time of enroll-

ment. Each such student known to the school system will be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Where there is no preregistration procedure for newly entering students, copies of the choice forms will be available at the office of the Superintendent and at each school during the time the school is usually open.

III

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student will be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extra-curricular activity) that may be conducted or sponsored by or affiliated with the school in which he is enrolled. A student attending school for the first time on a desegregated basis will not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, nonracially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, will be open to all persons without regard to race or color. All special educational programs conducted by the school system will be conducted without regard to race or color.

IV

SCHOOL EQUALIZATION

A. *Inferior Schools.* In schools heretofore maintained for Negro students, the school system will take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white persons. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios will, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this subparagraph, such school will be closed as soon as possible, and students enrolled in the school will be reassigned on the basis of freedom of choice. By October of each year, the school board will report to the State Superintendent of Education pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and will outline the steps to be taken and the time within which they will accomplish the equalization of such schools.

B. *Remedial Programs.* The school system will provide remedial education programs which permit students attending or who have previously attended all-Negro schools to overcome past inadequacies in their education.

V

SCHOOL CONSTRUCTION AND CONSOLIDATION

To the extent consistent with the proper operation of the school system as a whole, the school board will, in

locating and designing new schools, in expanding existing facilities, and in consolidating schools, do so with the object of eradicating past discrimination and of effecting desegregation. The school board will not build, consolidate or expand schools based on recommendations of any state survey conducted prior to March 1967 unless the state reapproves such building, consolidation or expansion. The school board will not fail to consolidate schools because desegregation would result.

VI

FACULTY AND STAFF

A. *Faculty Employment and Assignment.* Race or color will not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race will be taken into account for the purpose of correcting the effect of the past segregated assignment of teachers in the dual system. Teachers, principals, and staff members will be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers will be assigned so that more than one teacher of the minority race (white or Negro) will be on a desegregated faculty. The school board will take affirmative steps to accomplish the desegregation of its school faculties, including substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year. The objective of the school system is that the pattern of teacher assignment to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school. The school system will accomplish faculty desegregation in a manner whereby the abilities, experience, specialties, and other qualifications of both white

and Negro teachers in the system will be, insofar as administratively feasible, distributed evenly among the various schools of the system.

B. *Dismissals.* Teachers and other professional staff members will not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system will be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system will be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the State Superintendent of Education.

VII

REPORTS

A. *Report on Choice Period.* The school system will file with the State Superintendent of Education on or before June 10 of each year a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report will also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

B. *Report After School Opening.* The system will file with the State Superintendent of Education within 15 days after the opening of schools for the fall semester of each year a report setting forth the following information:

(1) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken on his request and the reasons therefor.

(2) The number of faculty vacancies, by school, that have occurred or been filled since the adoption of this plan or the latest report submitted pursuant to this subparagraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(3) The number of students by race, in each grade of each school.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next school year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all white or all Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 1, 1967.* You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or to the office of the Superintendent at any time between May 1 and June 1. No one may require you to return your choice form before June 1 and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. The school board is rerouting buses and writing new rules for assigning students to buses, so that there will be no more overlapping bus routes and students will be assigned to buses

*In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

without regard to race. (Delete if the school system does not provide transportation.)

Your school board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out successfully.

Sincerely,

Superintendent

CHOICE FORM

This form is provided for you to choose a school for your child to attend next school year. You have 30 days to make your choice. It does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or a Negro school. This form must be mailed or brought to the principal of any school in the system or to the office of the Superintendent (address), by June 1, 1967. A choice is required for each child.

Name of child .....
(Last) (First) (Middle)

Address .....

Name of parent or other adult serving as parent .....

If child is entering first grade, date of birth:

.....
(Month) (Day) (Year)

Grade child is entering .....

School attended last year .....

Choose one of the following schools by marking an X beside the name.

	Name of school	Grades Offered	Location
( )	.....	.....	.....
( )	(All schools in the district, the grades offered by each, and the location of each will be listed on the		
( )	form prior to its distribution to parents and students.)		
( )	.....	.....	.....

Signature .....

Date .....

.....

.....

To be filled in by Superintendent:

School assigned .....

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE and HENRY A. LEE, by Detroit Lee and Hattie M. Lee, their parents and next friends; PALMER SULLINS, JR., ALAN D. SULLINS and MARSHA MARIE SULLINS, by Palmer Sullins and Della D. Sullins, their parents and next friends; GERALD WARREN BILLES and HELOISE ELAINE BILLES, by I. V. Billes, their father and next friend; WILLIE M. JACKSON, JR., by Mabel H. Jackson, his mother and next friend; WILLIE B. WYATT, JR., and BRENDA J. WYATT, by Willie B. Wyatt and Thelma A. Wyatt, their parents and next friends; NELSON N. BOGGAN, JR., by Nelson Boggan, Sr., and Mamie Boggan, his parents and next friends; WILLIE C. JOHNSON, JR., BRENDA FAYE JOHNSON and DWIGHT W. JOHNSON, by Willie C. Johnson and Ruth Johnson, their parents and next friends, and WILLIAM H. MOORE and EDWINA M. MOORE, by L. James Moore and Edna M. Moore, their parents and next friends,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION, MADISON DAVIS, Chairman; JOHN M. DAVIS, B. O. DUKES, F. E. GUTHRIE, and FRANCES (MRS. J. R.) RUSH, and C. A. PRUITT, Superintendent of Schools of Macon County, Alabama; LURLEEN BURNS WALLACE, in her capacity as Governor of the State of Alabama, and as President of Alabama State Board of Education; ALABAMA STATE BOARD OF EDUCATION; ERNEST STONE, Secretary and Executive Officer of Alabama State Board of Education; JAMES D. NETTLES, ED DANNELLY, MRS. CARL STRANG, FRED L. MERRELL, W. M. BECK, VICTOR P. POOLE, W. C. DAVIS, CECIL WORD and HAROLD C. MARTIN, as members of Alabama State Board of Education,
Defendants.

(Filed March 22, 1967)

Before RIVES, Circuit Judge, and GROOMS and JOHNSON, District Judges.

PER CURIAM:

In these supplementary proceedings, this Court is once again called upon to consider whether the defendants[1] Lurleen Burns Wallace as Governor of the State of Alabama and as President of the Alabama State Board of Education, Ernest Stone as Secretary and Executive Officer of the Alabama State Board of Education (sometimes referred to as the State Superintendent of Education), and the individual members of the Alabama State Board of Education, have continued, and are continuing, to use their authority to operate throughout the State of Alabama a dual school system based on race.

This Court is also once again called upon to pass upon the constitutional validity of a tuition grant law (Title 52, § 61(8), Code of Alabama) passed by the Legislature of the State of Alabama and approved by the Governor on September 1, 1965.

I. PROCEDURAL HISTORY

This action was commenced over four years ago by Negro parents of school-age children, against the Macon County Board of Education, seeking to desegregate the public schools in Macon County, Alabama. In July 1963 the United States was added as a party and as amicus curiae

1. Pursuant to Rule 25(d), Federal Rules of Civil Procedure, this Court on January 23, 1967, ordered that Lurleen Burns Wallace in her capacity as Governor of the State of Alabama and as President of the Alabama State Board of Education, Ernest Stone, Secretary and Executive Officer of the Alabama State Board of Education; Ed Dannelly and Mrs. Carl Strang as members of the Alabama State Board of Education, be substituted as defendants for the named defendants George C. Wallace, Austin R. Meadows, J. T. Albritton and J. P. Faulk, Jr., respectively.

in order that the public interest in the administration of justice would be represented. After a full hearing, this Court in August 1963 made its findings and conclusions and ordered the public schools in Macon County, Alabama, desegregated. *Anthony T. Lee, et al.*, Plaintiff, *United States of America*, Plaintiff and Amicus Curiae v. *Macon County Board of Education*, MD Ala., August 22, 1963, 221 F. Supp. 297. Thereafter, on three separate occasions during the 1963-64 school year, this Court found it necessary to enjoin state officials from various forms of interference with the peaceful and orderly desegregation of schools in Macon County.[2]

In February 1964 plaintiffs filed a supplemental complaint, adding as defendants George C. Wallace as President of the Alabama State Board of Education, Austin R. Meadows, Executive Officer and Secretary of the Alabama State Board of Education, and other individual members of the State Board of Education. In this supplemental complaint the plaintiffs requested this Court (1) to enjoin these defendants from operating a dual school system based upon race throughout the State of Alabama, (2) to enter an order requiring state-wide desegregation of schools in the State of Alabama, (3) to enjoin the use of state funds to perpetuate the dual school system, and (4) to enjoin as unconstitutional the tuition grant law of the State of Alabama (Chapter 4B [§§ 61(13) through 61(21)], Title 52, Code of Alabama). At this stage of the proceeding, the Chief Judge of the United States Court of Appeals for the Fifth Circuit, in response to a request of the district judge, constituted a three-judge court pursuant to §§ 2281 and 2284, Title 28, United States Code.

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2. *United States* v. *Wallace*, 222 F. Supp. 485 (September 1963); *Lee* v. *Macon County Board of Education*, order of February 3, 1964; *United States* v. *Rea*, 231 F. Supp. 772 (February 1964).

After an oral hearing, a review of the evidence and arguments of counsel, this Court in July 1964[3] made its findings and conclusions to the effect that there was a dual school system based upon race that was maintained and operated throughout the State of Alabama and that it was the policy of the state and, in particular, the Governor, George C. Wallace, as President of the Alabama State Board of Education; Austin R. Meadows, Secretary and Executive Officer of the Alabama State Board of Education, and the individual members of the Alabama State Board of Education, to promote and encourage the implementation of that racial policy in the operation of the Alabama public schools. It was also concluded that Alabama's tuition grant law was nothing more than a sham established for the purpose of financing with state funds a white school system in the State of Alabama. Accordingly, the defendant state officials were enjoined from:

> Interfering with, preventing or obstructing by any means, the elimination of racial discrimination by local school officials in any school district in the State of Alabama;
>
> Approving, authorizing or paying any tuition grant or grant-in-aid under the provisions of Chapter 4B [Sections 61(13) through 61(21)] of Title 52 of the Alabama Code for the attendance of any person in a school in which enrollment or attendance is limited or restricted upon the basis of race or color;
>
> Failing, in the exercise of its control and supervision over the public schools of the State, to use such control and supervision in such a manner as to promote and encourage the elimination of racial discrimination in the public schools, rather than to prevent and discourage the elimination of such discrimination.

3. *Anthony T. Lee et al.*, Plaintiffs, *United States of America*, Plaintiff and Amicus Curiae v. *Macon County Board of Education*, MD Ala., July 13, 1964, 231 F. Supp. 743.

In August 1966 the United States of America was permitted to file a supplemental complaint in intervention wherein the United States as a party attacked the constitutionality of Alabama's new tuition grant statute[4] passed after this Court enjoined, in its order of July 1964, the paying of any tuition grant or grant-in-aid under the provisions of Chapter 4B, Title 52 of the Alabama Code. The complaint in intervention by the United States attacked the new statute on the basis that it was for no purpose other than to perpetuate racial segregation in the public schools of Alabama. This aspect of the case was submitted on stipulation and is discussed later in this opinion.

In September 1966 and in November 1966, the plaintiffs filed additional supplemental complaints again asking for a state-wide desegregation order and an injunction against the use of state funds to support a dual school system. Following extensive discovery by all parties, the case was heard in November 1966 and is now submitted upon the evidence and the parties' oral arguments and briefs.

II. FACTUAL HISTORY

In the July 1964 order, this Court found that the defendant George C. Wallace, President of the Alabama State Board of Education, the State Board of Education, the several individual members thereof, and the Secretary and Executive Officer of the Alabama Board of Education, Austin R. Meadows, had demonstrated that they had enormous authority and power over the actual operation of the various local school systems throughout the state. This conclusion was based on the actual assumption or usurpation of authority by these defendants over the local

4. The 1965-66 tuition grant laws were not in the form of amendments to the old tuition grant statute; instead, they were designated as § 61(8), Title 52, Code of Alabama.

school boards exemplified by their total control, when they chose to exert it, over the Macon County school system, and also by the general statutory power granted to these various officials to supervise and control the public schools in the State of Alabama. Examples of the Governor's actions and control, as found previously by this Court, are:

> As stated above, acting pursuant to this Court's order, the defendant Macon County Board of Education assigned 13 Negro pupils to the Tuskegee Public High School. These pupils were assigned in grades eight through twelve and were scheduled to begin school on September 2, 1963. Early on the morning of September 2, an Alabama State trooper visited the home of Macon County Superintendent Pruitt and presented him with an order of Governor George C. Wallace, who is also under the law of Alabama the ex officio President of the Alabama State Board of Education. This Executive Order stated, in part, as follows:
>
> > WHEREAS, there now exist in the State of Alabama conditions calculated to result in a disruption of the peace and tranquility of this State and to occasion peril to the lives and property of the citizens thereof, this situation resulting from the threat of forced and unwarranted integration of the public schools of this State; and,
> >
> > * * *
> >
> > NOW, THEREFORE, I, George C. Wallace, as Governor of the State of Alabama, and in conformity with the Constitutional and statutory power vested in me as Governor of said State, do hereby order and direct the Macon County Board of Education, Macon County, Alabama, to delay the opening of Tuskegee High School for a period of one week, until, to-wit: Monday, September 9, 1963, with the sole and express purpose of allowing the Governor of the State of Alabama to preserve the peace, maintain domestic

tranquility and to protect the lives and property of all citizens of the State of Alabama.

DONE this the 2nd day of September, A. D., 1963.

/s/ George C. Wallace
As Governor of the State of Alabama

Acting upon this direction of Governor Wallace, the State troopers surrounded the Tuskegee High School, and neither the pupils nor teachers were permitted to enter the school. Tuskegee High School remained closed for one week. On September 9, 1963, Governor Wallace issued another Executive Order, which stated, in part:

> NOW, THEREFORE, I, George C. Wallace, as Governor of the State of Alabama, and in conformity with the Constitutional and statutory power vested in me as Governor of said State, do hereby order and direct that no student shall be permitted to integrate the public schools of the City of Tuskegee, Alabama.

Governor Wallace announced publicly that the State Legislature had provided for grants-in-aid to private schools and assured the organizers of the Macon Academy that the Macon County Board of Education would cooperate in making grants-in-aid available through the use of its statutory authority to provide such aid to students in lieu of operating a particular public school.

Examples of the actions and control of the State Board of Education and its executive officers, as previously found by this Court, are:

In January, 1964, the Alabama State Board of Education passed the following resolution:

> BE IT RESOLVED That the State Board of Education hereby orders that Tuskegee High School be closed, all grades above the seventh grade, and that the

teachers be transferred to other schools in the Macon County School System and the children transferred to other schools in the Tuskegee area, in accordance with the State Board of Education policy of closing schools where the teacher load is not sufficient to justify paying teachers, and in accordance with Title 52, Code of Alabama, 1940, as amended; and

BE IT FURTHER RESOLVED That the Alabama State Board of Education hereby orders the Macon County Board of Education to provide school bus transportation for the children attending the Shorter and Notasulga schools in Macon County.

On the same date, this resolution was wired by the State Superintendent of Education to the Macon County Superintendent of Education. In the same session, the State Board directed the Governor to take whatever steps were necessary to execute its directive to close the Tuskegee Public High School above grade seven. In compliance with the directive of the State Board, the County Board of Education closed the Tuskegee High School effective February 3, 1964, and directed that all students then attending Tuskegee High School (12 Negro and no white sudents) be transferred to other schools in the "Tuskegee area." The County Board of Education further directed that the teachers of the Tuskegee High School be assigned to such other schools in the county as might be designated. The effect of the State Board's resolution facilitated the transportation of white children to the "all white" Shorter and Notasulga schools and by limiting the Negro pupils to "other schools in the Tuskegee area," required them to return to the "all Negro" Tuskegee Institute High School in Tuskegee, Alabama. When on February 3, 1964, the Negro pupils were barred from the Tuskegee High School, this Court, upon proper motion, issued a temporary restraining order, the effect of which did not require the reopening of the Tuskegee High School for the 12 Negro pupils, but ordered these Negro pupils admitted to Shorter and Notasulga on the same basis

as the white pupils who were transferred from the Tuskegee High School when the Negro pupils first attended in September, 1963.

In February, 1964, the State Board of Education adopted other resolutions directing the Macon County Board to provide financial assistance under the grant-in-aid law:

> BE IT RESOLVED That the Macon County Board of Education is directed to forthwith, February 4, 1964, provide financial assistance to parents or guardians of students under the grant-in-aid law of the State of Alabama as set forth in Title 52, of the 1940 Code of Alabama, as amended.
>
> BE IT RESOLVED That the State Board of Education deplores the order of Judge Johnson and pledges every resource at our command to defend the people of our State against every order of the Federal courts in attempting to integrate the public schools of this State and will use every legal means at our command to defeat said integration orders and pledges our full support to the local boards of education in supporting the public school system as now constituted with the law, and will give every assistance possible to support every effort to maintain our way of life and high educational standards for all citizens of our State.

Based upon such findings as reflected by the evidence, this Court found that "the State of Alabama has an official policy favoring racial segregation in public education," and that, strictly in accordance with this official policy, "the State of Alabama has operated and presently operates a dual school system based upon race." In the July 1964 order, the Court further found and concluded that "the purpose of said State officials, as evidenced by their actions already recited, was clearly to prevent or impede any desegregation through their unlawful interference with

the city and county school boards' attempting to comply with the law." It was only "through the exercise of considerable judicial restraint" that this Court refrained in July 1964 from requiring these defendant state officials to exercise their control and authority over the various local school boards throughout the state for the purpose of desegregating the school systems on a state-wide basis and to enjoin said defendants from using state funds for the purpose of perpetuating a dual school system based upon race. The exercise of restraint in that instance was prompted by the desire on the part of each member of this Court to afford these defendants every opportunity to comply in good faith with their affirmative constitutional duty to desegregate the state's public schools. See *Cooper* v. *Aaron*, 358 U.S. 1 (1958). *Board of Public Instruction of Duval County, Fla.* v. *Braxton*, 326 F. 2d 616, 5th Cir. 1964, cert. denied 377 U.S. 924. We were, however, careful to admonish:

> Needless to say, it is only a question of time until such illegal and unconstitutional support of segregated school systems must cease. These State officials and the local school officials are now put on notice that within a reasonable time this Court will expect and require such support to cease. These school officials should now proceed to formulate and place into effect plans designed to make the distribution of public funds to the various schools throughout the State of Alabama only to those schools and school systems that have proceeded with "deliberate speed" in the desegregation of their schools and school systems as required by *Brown* v. *Board of Education*, supra.

III. THE MERITS

Over two and one-half years have now elapsed since that order was entered. During this period the focus on the rights of American citizens, regardless of their race or

color—and in particular on the right of Negro children to attend public schools without discrimination on account of their race or color—has increasingly sharpened. The Congress of the United States in Public Law 88-352 (Civil Rights Act of 1964) has declared it to be a national policy that students shall have the right to attend public schools without regard to their race, color, religion or national origin; that the term "public school" means any elementary or secondary educational institution, or any institution of higher education or any technical or vocational school above the secondary school level operated by a state, subdivision of a state, or governmental agency within a state, or operated through the use of governmental funds.[5] The Attorney General was given authority to institute suits against school systems for the purpose of furthering "the orderly achievement of desegregation in public education. . . ."[6] With the knowledge that the public school systems throughout the United States were receiving federal financial assistance in large quantities, the Congress declared, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[7] Negroes themselves have begun filing individual lawsuits in greater volume than ever before, for the purpose of desegregating public school facilities. These various efforts, insofar as the Alabama school system is concerned, have met the relentless opposition of these defendant state officials. Not only have these defendants, through their control and influence over the local school boards, flouted every effort to make the Fourteenth Amend-

5. Title IV, §§ 401-406.
6. Title IV, §§ 407-410.
7. Title VI, § 601.

ment a meaningful reality to Negro school children in Alabama; they have apparently dedicated themselves and, certainly from the evidence in this case, have committed the powers and resources of their offices to the continuation of a dual public school system such as that condemned by *Brown* v. *Board of Education*, 347 U.S. 483 (1954). As a result of such efforts on the part of those charged with the duty and responsibility under the law as announced in 1954 by the Supreme Court in *Brown*, by the Congress of the United States in the Civil Rights Act of 1964, and, more specifically, by this Court in its July 1964 order, today only a very small percentage of students in Alabama are enrolled in desegregated school systems.[8] Based upon this fact and a continuation of such conduct on the part of these state officials as hereafter outlined, it is now evident that the reasons for this Court's reluctance to grant the relief to which these plaintiffs were clearly entitled over two years ago are no longer valid.

It is considered appropriate to restate the general scope of the control and authority of these defendant officials over the public schools in Alabama. As noted earlier, the defendant officials have extensive powers over this public school system. Section 262 of the Alabama Constitution provides that "The supervision of the public schools shall be vested in a superintendent of education, whose powers, duties . . . shall be fixed by law." The State Board of Education has similar duties: "[the Board] shall exercise, through the state superintendent of education and his professional assistants, general control and supervision over the public schools of the state. . . ." Title 52, § 14,

8. The percentage of students enrolled in schools in which they are in a racial minority are: White, 0.003%; Negro, 0.34%. The 1965-66 Annual Reports to the Alabama State Department of Education reflect that of the 294,734 Negro children attending public schools in Alabama only 1,009 were attending desegregated schools.

Code of Alabama. The Legislature has also provided that "The state superintendent of education shall execute the educational policies of the state board of education." Title 52, § 45, Code of Alabama.

The State Board is expressly authorized to adopt rules and regulations governing school construction, school sanitation, and physical examination of school children, and must enforce all rules relating to "school health, compulsory education, and child conservation." Title 52, § 15, Code of Alabama. It controls the grading and standardizing of public schools,[9] the minimum contents of courses of study,[10] and the training and certification of teachers.[11] The State Board of Education is further charged with the duty of "equalizing the public school facilities throughout the State" and administers a fund for that purpose. Title 52, § 33, Code of Alabama. The State Board and the State Superintendent together exercise a broad power of review of actions of local school boards and local superintendents in "matters relating to finance, and other matters seriously affecting the educational interest." Title 52, §§ 34 and 47, Code of Alabama.

The Board also has broad powers to effectuate and supplement other powers previously expressly conferred. Title 52, § 31, Code of Alabama.

It was on the basis of these provisions that the Supreme Court of Alabama was able to conclude: "Every public school is a state school, created by the state, supported by the state, supervised by the state, through state-wide and local agencies, taught by teachers licensed by the state, employed by agencies of the state." *Williams, Supt. of Banks,*

9. Title 52, § 16, Code of Alabama.
10. Title 52, § 17, Code of Alabama.
11. Title 52, § 20, Code of Alabama.

et al. v. *State, For Use and Benefit of Pickens County, et al.*, 230 Ala. 395, 397, 161 So. 507, 507-08 (1935).[12]

To maintain the racial characteristics of the Alabama public school system, the defendant state officials have used their power in essentially two ways. First, they have used their authority as a threat and as a means of punishment to prevent local school officials from fulfilling their constitutional obligation to desegregate schools, and, second, they have performed their own functions in such a way as to maintain and preserve the racial characteristics of the system. No useful purpose would be served by reiterating the machinations surrounding the closing of schools in Tuskegee, Alabama, and the Governor's abortive efforts to thwart the desegregation of Tuskegee High School, since this episode is adequately set out in this Court's opinion of July 1964 (231 F. Supp. 743). Such conduct, and its continuation as hereinafter found, reveals a broad spectrum of state interference with local desegregation efforts.

Title VI of the Civil Rights Act of 1964, as stated earlier, prohibits discrimination in federally assisted programs. This law became effective July 2, 1964. In December 1964 the Secretary of Health, Education and Welfare of the United States published regulations for compliance with Title VI programs administered by his department.[13] These regulations require, among other things, that any application for federal financial assistance be accompanied by an assurance that the program will be conducted, or the facility operated, on a nondiscriminatory basis.[14]

On March 4, 1965, State Superintendent of Education Meadows submitted to the United States Commissioner of

12. *Accord*: *State* v. *Tuscaloosa County et al.*, 233 Ala. 611, 172 So. 892 (1937).

13. 45 C.F.R. 80.1-80.9.

14. 45 C.F.R. 80.4.

Education state-wide assurance of compliance. When Dr. Francis Keppel, United States Commissioner of Education, questioned this "assurance," the State Superintendent of Education reacted by attacking Dr. Keppel's letter through a news release to the sueprintendents of the local school systems throughout Alabama. Approximately two weeks after filing his state-wide assurance of compliance, Superintendent Meadows told the Alabama Teachers Association:

> . . . The minority race has a new junior college in Mobile and a new one is being established in Jefferson County . . .
>
> * * *
>
> Every type of education facility available to the majority group in Alabama has been made available to the minority group . . .

His address ended with the following plea:

> . . . Will this Nation let Alabama continue its progress, nurture its fine culture, and further its goal of peaceful existence in the only way it knows to exist or will all of this be destroyed by outsiders who either do not understand or do not care enough for either race in Alabama?

In April 1965 the United States Commissioner of Education issued "guidelines" requiring the school systems to take immediate steps to desegregate students, facilities and programs.[15] Pursuant to these guidelines, a number of Alabama

15. Nothing said here should be construed, inferentially or otherwise, as a decision by this Court on the validity or in validity of the *1966* guidelines as issued by the United States Commissioner of Education, since that question, and other related questions, is presently pending in a case styled *Alabama NAACP State Conference of Branches et al.*, Plaintiffs, *United States of America*, Plaintiff and Amicus Curiae v. *George C. Wallace et al.*, Defendants, being heard by a separate three-judge court in this district. *Furthermore, in this case we deal solely with constitutional requirements on the part of public officials not to discriminate on the basis of race in the operation of public schools and with constitutional requirements on the part of public officials to take affirmative ac-*

school districts decided to desegregate all twelve grades for the 1965-66 school year. In August 1965, and after *Singleton* v. *Jackson Municipal Separate School District*, supra, Governor George C. Wallace sent the Superintendent of each such district the following telegram:

> WE HAVE BEEN INFORMED THAT YOUR SCHOOL BOARD HAS VOLUNTARILY SUBMITTED A SO-CALLED COMPLIANCE PLAN COVERING ALL GRADES IN YOUR SCHOOL SYSTEM. AS YOU KNOW, WE HAVE NEVER ASKED ANY SCHOOL BOARD TO VIOLATE ANY PROVISION OF FEDERAL OR STATE LAW. IT IS OUR CONSIDERED JUDGMENT THAT ANY PLAN FOR SO-CALLED NON-DISCRIMINATION IN ALL GRADES IS BEYOND EVEN THE MINIMUM REQUIREMENTS SET BY THE U S COMMISSIONER OF EDUCATION. IN FACT, THE DEPARTMENT HAS ACCEPTED AS MINIMUM COMPLIANCE SOME PLANS COVERING ONLY FOUR GRADES. IT IS ALSO READILY APPARENT THAT THOSE SCHOOL SYSTEMS WHICH HAVE BEEN REQUIRED TO DESEGREGATE UNDER FEDERAL COURT ORDER ARE NOT REQUIRED TO DESEGREGATE ALL 12 GRADES IN ONE YEAR. WE THINK IT WOULD BE ADVISABLE FOR YOUR SCHOOL BOARD TO RECONSIDER YOUR ACTION IN THE SUBMISSION OF YOUR COMPLIANCE PLAN.

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tion to disestablish state enforced or encouraged public school segregation and to eliminate the effects of past state enforced or encouraged racial discrimination in their activities and in their operation of the public school system in the State of Alabama. It is felt that it is necessary, however, to discuss the conduct of some of these defendants in connection with the compliance or noncompliance of the *1965* guidelines on the part of local school officials for the purpose for demonstrating the extent of the control exercised by these state officials over the local school boards throughout the state. In this connection, it should be noted that in June, 1965, the United States Court of Appeals for the Fifth Circuit recognized the guidelines, as then issued (1965 guidelines), as "standards for compliance with the requirements of Title VI of the Civil Rights Act of 1964." *Singleton* v. *Jackson Municipal Separate School District*, 348 F. 2d 729, 731. For the purpose of emphasis, we reiterate that in this case this Court is not concerned with the validity of any guidelines issued by the United States Commissioner of Education in either 1965 or 1966.

On September 3, 1965, the Governor sent them another telegram:

> THIS FOLLOW-UP TELEGRAM COMES AFTER A MEETING OF THE STATE BOARD OF EDUCATION WHICH PASSED A RESOLUTION YESTERDAY EXPRESSING GRAVE CONCERN ABOUT THE FUTURE OF PUBLIC EDUCATION IN ALABAMA IN VIEW OF THE FACT THAT SOME SCHOOL BOARDS HAVE GONE BEYOND THE MAXIMUM REQUIREMENTS OF COURT PRECEDENTS IN EXECUTING COMPLIANCE PLANS. WE AGAIN RESPECTFULLY CALL TO YOUR ATTENTION THAT THE EXECUTION AND ADMINISTRATION OF PLANS BEYOND THOSE REQUIRED IS NOT IN THE INTEREST OF PUBLIC EDUCATION IN THE STATE OF ALABAMA. SUCH WAS ENUNCIATED BY THE SOUTHERN GOVERNORS MEETING IN ATLANTA. IN VIEW OF THE FACT THAT UNDER THE PUPIL PLACEMENT ACT THE ADMINISTRATION AND ASSIGNMENT OF PUPILS IS YOUR PREROGATIVE, WE AGAIN RESPECTFULLY REQUEST THAT YOU TAKE WHATEVER ACTION IS NECESSARY TO SEE THAT THE ADMINISTRATION AND EXECUTION OF THESE PLANS DO NOT GO BEYOND THE REQUIREMENTS OF FEDERAL COURT ORDERS OF FIVE GRADES. WE URGE CAREFUL CONSIDERATION OF THE RESOLUTION PASSED UNANIMOUSLY BY THE STATE BOARD OF EDUCATION, A COPY OF WHICH WILL BE FORWARDED TO YOU AND WHICH WE WHOLEHEARTEDLY ENDORSE. WE COMMEND THE DILIGENT WORK OF THE GREAT MAJORITY OF LOCAL SCHOOL BOARDS WHO HAVE DONE AN OUTSTANDING JOB UNDER EXTREMELY TRYING CIRCUMSTANCES.

On September 3, 1965, Superintendent of Education Meadows sent the local school officials a copy of a resolution by the State Board of Education urging them "to take

no action in the administration and execution of compliance plans which are not required by law or court order. . . ." Superintendent Allen Thornton of Lauderdale County, who had attempted to justify his board's actions to the Governor, received the following telegram from the Governor:

> YOUR STATEMENT TO THE GOVERNORS OFFICE ON THURSDAY SEPTEMBER 2 THAT YOU ARE SATISFIED WITH THE PUBLIC SCHOOL SITUATION IN LAUDERDALE COUNTY WHERE MORE NEGRO PUPILS ARE ENROLLED IN THE PREVIOUSLY ALL WHITE SCHOOLS THAN ARE IN EITHER OF THE LARGE CITIES OF BIRMINGHAM OR MONTGOMERY, AND YOUR FURTHER STATEMENT THAT YOU PLAN TO ELIMINATE EVENTUALLY ALL NEGRO SCHOOLS IN THE COUNTY AND TRANSFER THE PUPILS TO WHITE SCHOOLS COULD DO MORE TO DESTROY THE PUBLIC EDUCATIONAL SYSTEM OF ALABAMA THAN ANY ACTION SINCE THE INFAMOUS 1954 DECISION OF THE UNITED STATES SUPREME COURT. THOSE WHO HAVE WORKED DILIGENTLY TO RAISE SUPPORT OF PUBLIC EDUCATION TO A RECORD HIGH LEVEL IN THE HISTORY OF OUR STATE RESENT AND REJECT THIS ATTITUDE. WE CALL UPON YOU TO ALIGN YOUR POLICIES WITH THE MINIMUM REQUIREMENTS OF THE LAW AND OF COURT ORDERS. (COPIES OF THIS TELEGRAM SENT TO FLORENCE TIMES, FLORENCE, ALA. ASSOCIATED PRESS, MONTGOMERY, ALA., AND UNITED PRESS INTERNATIONAL, MONTGOMERY, ALABAMA).

These telegrams had their effect. For instance, on September 6, 1965, the Choctaw County Board of Education resolved:

> That due to the change in conditions, particularly within the past few days, the Board concludes it is for the best interest of the children attending the

schools of Choctaw County, Alabama, their safety and welfare, for the continued orderly operation of the schools in the County, and for the prevention of violence which would likely result in serious consequences adversely affecting the orderly operation of the schools, the plan of desegregation of the schools of Choctaw County, Alabama, adopted by this Board on August 23, 1965, be and the same is hereby revoked.

The reaction of these defendant state officials and their conduct and the responses by the local school officials concerning the 1966 guidelines issued on March 7, 1966, by the United States Department of Health, Education and Welfare, for the reasons set forth by this Court in footnote 15, supra, will not be made a part of the findings and conclusions of this Court in this case.

Conduct on the part of these state officials to thwart desegregation of the public school system in the state continued, and on July 1, 1966, Alabama State Superintendent of Education Meadows expressed his views on segregation in a parable which he circulated to each local superintendent of education throughout the State of Alabama.[16]

16. "'Segregation' is a perfectly good word. It has been practiced down through the ages for good results. The Lord set aside or segregated fruit from the apple tree in the Garden of Eden from Adam and Eve, but Eve persuaded Adam to taste the fruit and they were both banished from the Garden of Eden and honest men and women have had to work for their living ever since.

"Segregation has been used by people of the civilized world for man's greatest advancement. Matrimony, the most sacred of all bonds for men and women, is the highest type of segregation. In matrimony, husband and wife bind themselves to cleave to one another, even to the extent of forsaking all others if necessary. A great ministerial commandment has been the public pronouncement at the wedding ceremony 'What God has joined together let no man put asunder.' Without this bond of segregation, there would be no family unit. One of the Ten Commandments forbids breaking this human bond of segregation. Segregation is the basic principle of culture. The good join together to segregate themselves from the bad.

In August 1966 the Tuscaloosa County School Board formally assigned two Negro teachers to two predominantly white schools and four white teachers to two Negro schools. Shortly after school opened in Tuscaloosa County and these assignments became known, the State Superintendent of Education telephoned the Tuscaloosa County Superintendent of Education, Dr. W. W. Elliott, and recommended that the two Negro teachers who had been assigned to predominantly white schools be transferred to other schools. Dr. Meadows advised the local school official that he was calling as a constitutional officer of the State of Alabama and that the assignment of Negro teachers to white schools was "against the law" and "public policy" of the state. A few days later Governor George C. Wallace, in a press conference, announced that he would use the police power of the state to maintain peace and requested that the two Negro teachers be removed and reassigned forthwith. Later, still in September 1966, State Superintendent Meadows again endeavored to persuade the Tuscaloosa County Superintendent of Education to reassign the Negro teachers. About the same time, Attorney Hugh Maddox, Legal Adviser to the Governor, telephoned the Tuscaloosa County Super-

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"Segregation is one of the principles of survival throughout the animal kingdom. Animals, in many instances, join their own kind to defend themselves by numbers against other animals that would destroy them without such segregated bond. Birds of a feather truly flock together. Wild geese fly across this continent in 'V' formation, but they never join any other flock of birds. Wild duck fly together and not with other birds. The wild eagle mates with another eagle and not with any other bird. Red birds mate with red birds, the beautiful blue birds mate with other blue birds, and so on through bird life.

"There can be segregation without immoral discrimination against anyone. Integration of all human life and integration of all animal life would destroy humanity and would destroy the animal kingdom. A time of reckoning must come in this United States of America on the fundamental principles of segregation and non-discrimination which can be achieved without destroying segregation in its true sense."

intendent and informed him that, "It [is] the public policy of the State that Negro teachers not teach white children" and that the Governor would use his police power to enforce the law. Dr. Elliott insisted that these Negro teachers were fully qualified and did not agree to reassign them. On October 17, 1966, the defendant Meadows, again by telephone, advised Dr. Elliott that the Governor suggested that two additional teacher units be allotted to the Tuscaloosa County school system provided the students being taught in white schools by the two Negro teachers were allowed the freedom to choose a white teacher. The State Board of Education also promised funds to the Tuscaloosa County school system for additional classroom space to accommodate two additional white teachers. These state officials also made it clear that similar measures would be taken in other communities if Negro teachers were assigned to teach white students. A news release circulated by Dr. Meadows on October 25, 1966, to all city and county superintendents and to all news media was as follows:

> In complete accord and with full approval of Governor George C. Wallace, any county or city board of education will be allocated a teacher unit and apportionment of funds therefor where such board employs a teacher for pupils to transfer from a teacher of the opposite race to a teacher of their own race by freedom of choice of such pupils and their parents. Two such teacher units have already been allocated to a county board of education in which thousands of people filed a petition for such relief, both with the county board of education and the Governor of Alabama.

The foregoing findings serve to illustrate that the actions on the part of the defendant Alabama officials have been designed to perpetuate the racially segregated public school system in the State of Alabama. These actions have

been to some extent, as noted, dramatic interference with local efforts to desegregate public schools. However, the most significant action by these defendant state officials, designed to maintain the dual public school system based upon race, is found in the day-to-day performance of their duties in the general supervision and operation of the system.

A. SCHOOL CONSTRUCTION AND CONSOLIDATION

The State Board of Education and its Secretary and Executive Officer have been vested by statute with general supervisory powers over public education in Alabama. Code of Alabama Title 52. The State Board is specifically authorized to adopt rules and regulations "for the proper construction of school buildings." Title 52, Section 15, Code of Alabama. For approximately fifty years, the State Department of Education has conducted periodic surveys of the Alabama school system. These surveys are for the purpose of enabling that department to make decisions and recommendations concerning the location, construction, consolidation, expansion and abandonment of schools and school buildings. The factual information is obtained from field inspections and relates to the distribution of student population within the school districts, the location, capacity and physical condition of school buildings, and other information concerning school sites. This information is then evaluated by the State Superintendent and the State Board of Education. Certain standards regarding the adequacy of physical structures have been established by the State Department; for instance, standards respecting the minimum size of school sites, minimum student standards, and minimum teacher standards. On the basis of the information gathered in the surveys and these standards, the survey teams make recommendations and classifications.

First, they classify the school buildings as either "suitable for permanent use," "suitable for temporary use," or "should be abandoned." Second, recommendations are made concerning the consolidation of existing schools. Third, recommendations are made concerning where new schools should be constructed or existing facilities enlarged. This information, together with the recommendations, is published by the State Department of Education in a Survey Report after the findings and recommendations are approved by the State Superintendent of Education. To a large extent, these recommendations—of necessity—are controlling upon the local school boards, since local boards that ignore them are penalized through the use of regulations that have been adopted by the State Board and through the use of other regulations such as those governing the allocations of state funds under the Minimum Program Fund[17] for teachers'

Other regulations establish a method of calculating the number of teacher units earned by and to be awarded each school. Transportation allowances to the local school districts are made in recognition of the survey recommendations, and the Survey Reports determine, to a large extent, the State Superintendent's approval or disapproval of sites for new school construction or existing school expansion. In each instance, the local school board must obtain the approval of the State Superintendent as to the location and need for expansion; the approval of the State Superintendent is also needed for construction projects, since the principal source of construction funds comes from state bond issues. The State Superintendent's approval on school construction projects is important, even where local funds are used, since local boards of education cannot issue warrants without the specific approval of the State Superintendent of Education. Title 52, Code of Alabama, §§ 216-218, 235

17. Title 52, §§ 208-215, Code of Alabama.
salaries.

(4). Furthermore, the Governor and the State Superintendent of Education constitute a majority of the Public School and College Authority. This agency has the power to establish priorities for projects and to make funds more readily available to local school systems.

The evidence in this case is absolutely overwhelming that the State Board of Education and the Alabama Superintendent of Education, with the assistance of their staff in the State Department of Education, have exercised extensive control over school construction and consolidation in such a manner as to perpetuate a dual public school system based upon race and to interfere with the orderly desegregation of the public schools in the State of Alabama. This discriminatory course of conduct on the part of these defendants has continued and persisted since this Court's order of July 1964; for instance, the interference of State Superintendent Meadows and the Governor with the Tuscaloosa County Board of Education and their offer to that local board regarding construction funds. Such an offer could have been for no purpose other than to thwart the efforts of that local board to desegregate the faculties of its schools. Furthermore, the use of that authority and control on the part of these defendants over school construction has not been confined to manipulating the availability of funds. For instance, a more insidious method of control over local boards for the purpose of perpetuating a dual public school system based upon race has been with respect to school construction and consolidation. This is found in the judgments and recommendations contained in the school surveys. The survey recommendations regarding consolidation strictly observe the racially segregated character of the schools. In Calhoun County—to take but one example—rather than recommend that the local board close down an inferior Negro school (Hawkins) and consolidate it with a nearby white school (Bynum), the survey recommended,

instead, that the Negro students from the Hawkins School be transported across the county to Calhoun County Training School, a Negro school. Not only was the Calhoun County Training School a greater distance from Hawkins, which necessitated busing for the purpose of maintaining segregation, but, compared to Bynum, the physical facilities were significantly inferior and less room was available for the Negro students who were bused from Hawkins. The Survey Report that was then in existence reflected that the Calhoun County Training School to which the Hawkins Negro students were transported "is located on an inadequate site about which little can be done." Such a method of consolidation was for no purpose other than to perpetuate segregation of the races in that public school system.

The survey teams have also sought to perpetuate the dual public school system by refusing to recommend consolidation where consolidation would have had the effect of desegregating. These reports reflect that the survey teams consistently compromise the minimum student standards in order to maintain segregation of the students. Such a course of conduct is condemning evidence that the defendants have sought to perpetuate and, through this means, have effectively perpetuated the dual public school system.

In yet another area, the state survey recommendations pertaining to the location of new schools have been designed to perpetuate the dual system. Considerations of economy, convenience, and education have been subordinated to the policy of racial separation; survey approvals of construction sites reflect this policy. A striking instance of this discriminatory conduct is found in the Clarke County survey conducted during the 1964-65 school year. At the time of the survey, there were twenty-three schools in the system attended by approximately 5800 students—2400 white and 3400 Negro. Consolidation was clearly

called for; yet the survey staff sought to perpetuate the segregated system by recommending and approving that, in each of the three principal towns of the county, two separate schools be maintained as permanent school installations, each covering grades 1-12. This recommendation in each of these three towns in Clarke County, Alabama, can be explained only in racial terms. Other similar numerous examples have been presented, the discussion of which would serve no useful purpose.

Furthermore, through the control of finances in school construction, these defendants have insured that Negro children are provided with markedly inferior educational opportunities. For example, the average pupil-teacher ratio in the Negro schools is higher than in the white schools; the per-pupil valuation of school buildings and contents is $607.12 per white pupil as compared to $295.40 per Negro pupil. Over 25% of the Negro high schools in Alabama are unaccredited as compared with only 3.4% of white high schools.

B. FACULTY AND STAFF

It is no longer open to question that faculty and staff desegregation is an integral part of any public school desegregation plan—not because of teachers' employment rights, but because students are entitled to a nonracial education, and assignment of teachers to students on the basis of race denies students that right. See *Bradley* v. *School Board of Richmond*, 382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Kemp* v. *Beasley*, 352 F. 2d 14 (8th Cir. 1965); *Singleton* v. *Jackson Municipal Separate School District*, 355 F. 2d 865 (5th Cir. 1966); *Wheeler* v. *Durham City Board of Education*, 363 F. 2d 738 (4th Cir. 1966); *Davis* v. *Board of School Commissioners of Mobile County*, 364 F. 2d 896 (5th Cir. 1966).

The constitutional duty to desegregate the faculties in public school systems was made clear by the Supreme Court of the United States in *Rogers* v. *Paul*, supra:

> Two theories would give students not yet in desegregated grades sufficient interest to challenge racial allocation of faculty: (1) that racial allocation of faculty denies them equality of educational opportunity without regard to segregation of pupils; and (2) that it renders inadequate an otherwise constitutional pupil desegregation plan soon to be applied to their grades.

This constitutional duty was recognized by the United States Court of Appeals for the Fifth Circuit in *Singleton* v. *Jackson Municipal Separate School District*, supra, when the Court stated:

> . . . [W]e regard it as essential that the plan provide an adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators, and other personnel.

and again in *Davis* v. *Board of School Commissioners of Mobile County*, supra, when the Court stated:

> . . . [T]he plan must be modified in order that there be an end to the present policy of hiring and assigning teachers according to race by the time the last of the schools are fully desegregated for the school year 1967-68.

The recent decision in *Clark* v. *Board of Education of the Little Rock School District*, 369 F. 2d 661, 669 (8th Cir., December 15, 1966), requires that specific steps must be taken now to end faculty segregation. The Court stated:

> We agree that faculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system. It is clear that the Board may not continue to operate a segregated teaching staff. . . . At this point the Board is going to have to end discriminatory practices in staff assignment and recruitment.

and, in another passage:

> [T]he Board should make all additional positive commitments necessary to bring about some measure of racial balance in the staff of the individual schools in the very near future. The age old distinction of "white schools" and "Negro schools" must be erased. The continuation of such distinctions only perpetuates inequality of educational opportunity and places in jeopardy the effective future operation of the entire "freedom of choice" type plan.

As in other areas, some of which have already been discussed, defendants have endeavored to thwart and, with considerable success, have thwarted efforts toward implementation of the constitutional requirement to eliminate faculty and staff segregation in the public school system of Alabama. The Governor's legal adviser was indeed correct when he declared that, "It [is] . . . the public policy of the State that Negro teachers not teach white children." Evidence in this case reflects that this policy has been successful for, of over 28,000 teachers in the state, only 76 are teaching in schools to which students of the opposite race have been traditionally assigned. Defendants, through the use of pressures, some of which have herein been outlined, have required local boards to conform to their views on faculty and staff segregation in the school system. As a matter of fact, they have acted affirmatively to use the Minimum Program Fund to make segregation of the faculties and staffs in the several school districts attractive. For instance, as we have previously noted, the State Superintendent of Education, at the insistence of the Governor, utilized the state's power, that had been vested in these defendants, of allocation of teacher units by authorizing two additional units to be used for the purpose of hiring white replacements for the two Negro teachers hired by the Tuscaloosa County Board of Education to teach in white schools.

Teacher institutes continue to be conducted separately for each race. Section 339, Title 52, Code of Alabama. Generally, the control exercised by these defendants over in-service training programs and teacher certification has been used not as a means to eliminate discrimination in the dual school system of Alabama but as an instrument to enforce segregation throughout that system.

In this area, as in other areas herein discussed, there is an affirmative duty on the part of these defendants, as well as on the part of other school officials throughout the state, to desegregate staffs and faculties. This is also a constitutional duty apart from any federal regulatory scheme.

C. TRANSPORTATION

It cannot seriously be contended that transportation is not a critical factor in the process of disestablishing the traditional dual public school system.[18]

The defendant state officials exercise considerable authority in this area since nearly 100% of the cost of local school transportation programs is paid from the state Minimum Program Fund and, further, since § 209, Title 52, Code of Alabama, empowers the State Board of Education to approve transportation routes submitted by the local boards

18. See, e.g., *Franklin* v. *Barbour County Board of Education*, 259 F. Supp. 545 (MD Ala. 1966); *Harris* v. *Crenshaw County Board of Education*, 259 F. Supp. 167 (MD Ala. 1966); *Carr* v. *Montgomery County Board of Education*, 253 F. Supp. 306 (MD Ala. 1966); *Harris* v. *Bullock County Board of Education*, 253 F. Supp. 276 (MD Ala. 1966); *United States* v. *Lowndes County Board of Education*, Civ. Action No. 2328-N, MD Ala., February 10, 1966; *Wright* v. *County School Board of Greenville County*, 252 F. Supp. 378 (ED Va. 1966); *United States* v. *North Pike Consolidated School District*, Civ. Action No. 3807, SD Miss. Sept. 25, 1965; *Baird* v. *Benton County Board of Education*, Civ. Action No. W.C. 6513, ND Miss. Aug. 3, 1965; *United States* v. *Natchez Special Municipal Separate School District*, Civ. Action No. 1120(W), SD Miss., January 28, 1966 as amended April 15, 1966; *Killingsworth* v. *Quitman Consolidated School District*, Civ. Action No. 1302(E), SD Miss., August 14, 1965.

and to establish minimum standards for the buses that are used to transport the students. This Court's finding in its July 1964 order that these defendants have used this control over transportation to perpetuate segregation is as true now as it was then. The State Board continues to finance and permit the operation of school bus systems organized on a racially discriminatory basis. The buses provided Negro children have been and continue to be of a markedly inferior quality. There is duplication and overlapping of bus routes in the school bus transportation provided in practically every area of the state to permit white children to avoid attending desegregated schools closer to their homes; further, this system has been and is being used to transport Negro children living near white schools to Negro schools miles away.

D. TRADE SCHOOLS, VOCATIONAL SCHOOLS AND STATE COLLEGES

The state's trade schools, vocational schools and state colleges[19] continue to be operated on a segregated basis. The operation of these systems is the immediate responsibility of the State Board of Education. See the Regional Vocational and Trade School Act of 1947, Code of Alabama, Title 52, § 451(4); the Alabama Trade School and Junior College Authority Act of 1963, Code of Alabama, Title 52, § 509(96); Code of Alabama, Title 52, §§ 451(3) and 509(85). See also Code of Alabama, Title 52, §§ 438 and 452.

There is no necessity for setting out the facts in detail concerning the operation of these state colleges since the evidence conclusively establishes—the defendants do not

19. The term "state college," as used herein, includes all state colleges or universities except the University of Alabama, Auburn University, University of South Alabama at Mobile, and Alabama College at Montevallo, which institutions have separate boards of trustees and are not administered by the Alabama State Board of Education.

controvert it—that these schools have been and continue to be operated as if *Brown* v. *Board of Education* were inapplicable in these areas. For example, § 438, Title 52, Code of Alabama, reads:

> The state board of education shall have the control and management of the several teachers' colleges of the state, for white teachers, located at Florence, Jacksonville, Livingston, Troy, and of the Alabama State College for Negroes located at Montgomery.

The plaintiffs are also clearly entitled to relief in this area.

It is quite clear that the defendants have abrogated, and openly continue to abrogate, their affirmative duty to effectuate the principles of *Brown* v. *Board of Education*, supra. Although the facts as herein outlined speak eloquently for themselves, there is no more clear an indication of this than Superintendent Meadows' statement that he has done nothing to eliminate segregation in the public schools of Alabama. As Judges Sobeloff and Bell stated in a concurring opinion in *Bradley* v. *School Board of the City of Richmond, Virginia*, 345 F. 2d 310, 322, 323 (4th Cir. 1965):

> *[T]he initiative in achieving desegregation of the public schools must come from the school authorities.*
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> * * *
>
> *Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity, "You now have a choice."* [Emphasis added.]
>
> * * *
>
> It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with *their* nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated.

Accord, Cooper v. *Aaron*, supra. Such a course of conduct on the part of these defendants has served to thwart and, in many instances, defeat voluntary desegregation plans that have been attempted by the local school districts.

It should be noted that one of the most illegal methods adopted by these defendants to impede desegregation on a local level is that they have consistently attempted to obscure the fact that local school authorities have a federal constitutional duty to desegregate their school systems totally, notwithstanding whether a particular system is under a court order or whether that school system agrees to comply with the requirements of the Department of Health, Education and Welfare of the United States.

Statements to the effect that "the local school districts should go no further than ordered by the Court," and the offers to replace federal funds with state funds have been designed to lead the local school authorities to believe that they have no such affirmative duty. Such philosophy completely ignores the fact that the paramount duty to desegregate is a constitutional one independent of any court order and independent of any federal regulatory program. It is entirely disingenuous of the defendants to fail to admit that their activities were coercive and for them to contend they were, at most, acting in an advisory capacity, with the ultimate control residing with the local boards. The record presented to this Court clearly indicates that these defendants stand ready to exercise, and have in many instances in areas of public education in Alabama exercised, the same powers and control that they demonstrated two and one-half years ago over the Macon County schools when the desegregated school was closed and white students were bused to other schools in the same system that continued to operate on a segregated basis. In addition, this Court's conclusion in its July 1964 order that "The control by the State Board of Education over the local school

systems is effected and rigidly maintained through control of . . . finances" has not been diminished by subsequent events. On the contrary, the evidence concerning the conduct of these defendants since 1964 strengthens that conclusion. This control on the part of these defendants over the local boards is all pervasive; it invests in these defendants power over school construction and consolidation, teachers, school transportation and other vital areas in the operation of the public schools throughout the state.

IV. THE TUITION GRANT STATUTE

As observed earlier in this opinion, state and local authorities are under an affirmative constitutional duty to provide equal educational opportunities for all children by ceasing to discriminate on the basis of race and to the extent herein noted and ordered, eliminating the effects of past discrimination. To obviate the performance of this duty, a state may neither operate and maintain two school systems —one integrated, one segregated—giving public school students a choice between the two,[20] *nor simply go out of the* business of running schools in some school districts and allow that function to be undertaken by private persons.[21] It is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.[22]

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20. *Boson* v. *Rippy*, 285 F. 2d 43, 45-46 (5th Cir. 1960); *Kelly* v. *Board of Education of City of Nashville*, 159 F. Supp. 272, 278 (MD Tenn. 1958).

21. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Lee et al.* v. *Macon County Board of Education*, 231 F. Supp. 743 (MD Ala. 1964).

22. See *Anderson* v. *Martin*, 375 U.S. 399 (1964). And see, *Lombard* v. *Louisiana*, 373 U.S. 267 (1963); *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726-27 (1961) (Justice Stewart concurring); *Evans* v. *Newton*, 382 U.S. 296, 305-307 (1965) (Justice White concurring); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 658 (ED La. 1961), aff'd per curiam, 368 U.S. 515 (1962).

Measured against these criteria and when viewed in the context of the facts and circumstances which gave rise to its enactment, the vice of the present tuition statute[23] becomes clear: It is but another attempt of the State of Alabama to circumvent the principles of *Brown* by helping to promote and finance a private school system for white students not wishing to attend public schools also attended by Negroes.

Alabama's present tuition statute must be analyzed in the historical context which gave rise to its enactment. It is unmistakably clear that the concept of tuition grants to students wishing to attend private schools in Alabama was born of an effort to resist and frustrate implementation of the *Brown* decision. *Lee* v. *Macon County Board of Education*, 231 F. Supp. 743 (MD Ala. 1964).[24] The first such

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23. "Any other provisions of law notwithstanding, no child shall be compelled to attend any school when in the judgment of the parent or guardian of such child attendance in the school to which assigned will be detrimental to the physical or emotional health of such child or subject the child to hazards to personal safety. In any such case, the parent or guardian of such child shall file written objections with the local board of education and request transfer and reassignment. Upon refusal of any board to grant such a request, the child shall proceed as provided in section 61(7) of this title, or in lieu thereof, submit an application to the state board of education for a tuition grant to attend any private nonsectarian school in or outside the school attendance district in which the child resides. Tuition grants approved by the state board shall not exceed a total of one hundred eighty-five dollars ($185.00) in any one school year, or a sum to be determined by the state superintendent of education to be the cost per pupil in average daily attendance in the public schools of the state, whichever sum shall be less. The state board of education shall promulgate rules and regulations for the administration of tuition grants which shall be paid only from funds appropriated by the legislature for such purpose. It shall be unlawful for any person to use funds granted under this chapter for any purpose other than for the payment of tuition in school; . . . ." Title 52, § 61(8), Code of Alabama.

24. It is appropriate to reiterate our conclusions on this point made in our July 13, 1964 order: "Alabama's grant-in-aid system appears to have been first proposed by the Special Interim Committee of the Alabama Legislature in 1954. The legislative history of the statute subsequently enacted by the Alabama

statute, enacted in 1957, authorized tuition grants for students attending private nondenominational schools in school districts where no public school was available. Chapter 4B of Title 52, Code of Alabama, of which the 1957 tuition grant statute was a section, authorized each local board of education to discontinue operating its public school when it found that the continued operation of its public school "will be accompanied by such tensions, friction, or potential disorder or ill will within the school as substantially to impair effective standards or objectives of education of its pupils, or by potential impairment of peace, order and goodwill in the community, school district, or county involved." Acts of Alabama 1957, No. 528, § 1 at 723. It was pursuant to this chapter that the State Board of Education ordered all grades above the seventh grade in the Macon County public schools closed and directed that payment of tuition grants be made to students residing in Macon County where no public schools were available, who attended racially segregated private schools. In our July 13, 1964 order, we found that implementation of the tuition grant statute was unconstitutional and enjoined its further use.

It is clear that the present tuition statute was born of the same effort to discriminate against Negroes, and was designed to fill the vacuum left by this Court's injunction against the 1957 tuition statute. Although the statute is cast in terms of making eligibility for a tuition grant turn on the parent's judgment that the child's attendance at public school will be detrimental to the child's "physical and

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Legislature reflects that this Committee was formed to consider means of meeting the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). The Committee's report to the Legislature set forth a number of proposals for delaying or avoiding racial desegregation in education, and it proposed a number of specific amendments to the Alabama Constitution, all of which were ultimately adopted. These grant-in-aid laws are all set out in Title 62, Code of Alabama, recompiled 1958." 231 F. Supp. at 743, n. 4.

emotional health," when read in perspective it turns eligibility for tuition on the parent's dissatisfaction with sending his child to a desegregated public school. Prior to 1965-66, § 61(8) said as much on its face. It authorized the parent or guardian of any child attending "any school in which the races are commingled" to terminate the child's attendance there. The amendment simply substituted for the objective test—commingling of races—the subjective test that now appears in the statute—"judgment" of the parent or guardian. Significantly, every dollar paid during the 1965-66 school year went to students enrolled in all-white private schools established when the public schools desegregated.

Finally, it is also important to emphasize that the state has failed to advance any rational basis on which to explain the statute. Eligibility for a tuition grant does not turn on the inadequacy of public educational facilities to accommodate all school-age children in the school district. The statute does not manifest state concern for equalizing the opportunity of all children, including the poor, to attend private schools, for the statute does not require a showing of financial need. Nor does the statute exhibit state concern for improving the educational opportunities of special classes of students—those who may be gifted or those who may be handicapped. Although the statute applies only to public school pupils, it may not be invoked by pupils in public schools who wish to attend private schools for reasons such as superior instruction, smaller classes, and so forth. The statute narrows its focus on an extremely limited class of students—those students whose physical or emotional health would be adversely affected or whose safety might be jeopardized by attending public schools. Since neither of these conditions can be demonstrated to have any rational basis in fact, there can be only one way to explain the statute: it is designed to aid and assist private

discrimination of the kind which would be condemned if attempted directly by the state. As such, the statute is unconstitutional.

It is appropriate to observe in concluding this aspect of the case that it is now becoming apparent that the State of Alabama is attempting to make a concerted effort to establish and support a separate and private school system for white students. Twice in less than three years this Court has had to strike down tuition grant provisions designed to achieve this end. Moreover, the Governor has officially encouraged private contributions to support the many private schools throughout the state *as alternatives to the public desegregated school system.*[25] Up to this point, this Court has used its injunctive powers to prevent the State of Alabama from establishing a separate school system for white children. It must be made perfectly clear, however, that if the state persists in its efforts dedicated to this end, and its involvement with the private school system continues to be "significant,"[26] then this "private" system will have become a state actor within the meaning of the Fourteenth Amendment and will need to be brought under this Court's state-wide desegregation order.

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25. "[Y]*our . . . donations . . . will help people in our State who are being forced to conduct private schools because of the destruction of their public schools.*

"This group, made up of representatives of the various private schools, will see that your contribution is distributed to these schools on an equitable basis. These people—these parents—are fighting for their freedom too—a freedom that affects all of us and I hope that you will join me in helping those whose schools have been taken away from them." (Emphasis added.)

26. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). See cases in footnote 22, supra. And see *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963).

V. THE RELIEF

A. GENERAL NATURE

As has been outlined in some detail, the defendant state officials have engaged in a wide range of activities to maintain segregated public education throughout the State of Alabama. These activities have been concerned with and have controlled virtually every aspect of public education in the state, including site selection, construction, consolidation, assignment of teachers, allocation of funds, transportation, vocational education, and the assignment of students.

The remedy to which these plaintiffs are constitutionally entitled must be designed to reach the limits of the defendants' activities in these several areas and must be designed to require the defendants to do what they have been unwilling to do on their own—to discharge their constitutional obligation to disestablish in each of the local county and city school systems in Alabama that are not already operating under a United States court order, the dual public school system to the extent that it is based upon race or color. In this connection, the State of Alabama and particularly the defendant state officials are under an affirmative constitutional duty to take whatever corrective action is necessary to disestablish such a system. Faculty members and staff members, facilities and activities, as well as student bodies, must be desegregated to such an extent that there no longer exists in the Alabama public school system discrimination of any sort or to any degree that is based upon race or color.

This Court can conceive of no other effective way to give the plaintiffs the relief to which they are entitled under the evidence in this case than to enter a uniform statewide plan for school desegregation, made applicable to each local county and city system not already under court order to desegregate, and to require these defendants to implement it. Only in this way can uniform, expeditious and substantial progress be attained, and only in this way can

the defendant state officials discharge the constitutional duty that was placed upon them twelve years ago in *Brown* v. *Board of Education*, supra. It cannot seriously be contended that the defendants do not have the authority and control necessary to accomplish this result. Certainly the possibility of losing state funds for failure to abide by and implement the minimum constitutional requirements for school desegregation which this opinion and the accompanying decree require will, without any doubt, effect compliance. Indeed, it is quite clear from the evidence in this case that the local school officials will, through economic necessity if for no other reason, abide by the orders and regulations of these state officials and, in most instances, will be relieved to find themselves no longer under the pressures and exhortations of these defendants to abrogate their clear constitutional duties in this area. The local officials should, after the entry of this opinion and the accompanying decree, be able to return to the teaching of students and dealing with the related educational problems rather than expending their time and energies trying to tread the difficult "middle ground" between conflicting federal and state demands.

The argument that this Court is proceeding without jurisdiction over indispensable parties to this litigation, to-wit, local school boards throughout the state, is not persuasive. We are dealing here with state officials, and all we require at this time is that those officials affirmatively exercise their control and authority to implement a plan on a state-wide basis designed to insure a reasonable attainment of equal educational opportunities for all children in the state regardless of their race. It may be that in some instances a particular school district will need to be brought directly into the litigation to insure that the defendant state officials have implemented this Court's decree and that the state is not supporting, financially or otherwise, a local system that is being operated on an un-

constitutional basis. Hopefully, these instances will be the exception and not the rule. Clearly this possibility does not diminish the propriety of the state-wide relief to be ordered. Having already resolved this issue of state-wide relief against the defendants in the order made and entered in *Lee, et al., United States of America,* Amicus Curiae v. *Macon County Board of Education,* July 13, 1964, 231 F. Supp. 743, further discussion and analysis is not necessary.

B. OTHER CONSIDERATIONS

Invariably in this area of our country the "freedom of choice" plan has been chosen by the courts and the school systems themselves as the method to effectuate the requirements of the Fourteenth Amendment in the field of desegregation of public educational facilities. This is the plan which this Court will require—for the time being—these defendant officials to implement throughout the State of Alabama.[27] This Court recognizes that in the freedom of choice plan there are many administrative complexities. It may be that these administrative problems will make some other method advisable in the future. It may well be that the freedom of choice method of desegregation will not fully and completely disestablish the dual public school system based upon race.[28] However, for the time being, provided that all of the factors designed to influence and having the effect of influencing choice be eliminated, the freedom of choice plan will be put into effect upon a state-wide basis. It should be emphasized that, if choice influencing factors are not eliminated, freedom of choice is a fantasy. A "freedom of choice" plan ordered by a court or adopted by school authorities is not an end in it-

27. The reasons are obvious why school officials have not chosen other plans such as the "neighborhood school" plan, for under such a plan white students would be immediately required to attend Negro schools located in their neighborhoods.

28. The United States Supreme Court has not yet ruled on the freedom of choice method of ending racial segregation in the field of public education. However, *Goss* v. *Board of Education,* 373 U.S. 683 (1963), has been cited as support for such a plan. See *Bradley* v. *School Board,* 345 F. 2d 310, 318 (4th Cir. 1965).

self; it is but a means to an end. The plan must operate in such a manner as to meet the constitutional mandate of the Fourteenth Amendment. As was stated in the concurring opinion in *Bradley* v. *School Board*, 345 F. 2d 310, 323:

> Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity, "You now have a choice." In many instances the choice will not be meaningful unless the administrators are willing to bestow extra effort and expense to bring the deprived pupils up to the level where they can avail themselves of the choice in fact as well as in theory. . . . The district judge must determine whether the means exist for the exercise of a choice that is truly free and not merely pro forma.

In short, the measure of a freedom of choice plan—or, for that matter, any school plan designed to eliminate discrimination based upon race—is whether it is effective. If the plan does not work, then this Court, as well as the State of Alabama school officials—both state and local—is under a constitutional obligation to find some other method to insure that the dual school system of public education based upon race is eliminated. In adopting this plan, therefore, we stress again that it may be only an interim plan. Its success will be periodically judged in the light of the criteria herein set out. For this and all other purposes, jurisdiction will be retained.

The decree and injunction heretofore issued in this case will be enlarged as herein indicated and a formal decree will be entered accordingly.

Done, this the 22nd day of March, 1967.

/s/ Richard T. Rives
United States Circuit Judge
/s/ H. H. Grooms
United States District Judge
/s/ Frank M. Johnson, Jr.
United States District Judge

APPENDIX 3

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23345

UNITED STATES OF AMERICA and LINDA STOUT, by her father and next friend, BLEVIN STOUT,
Appellants,

versus

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Appellees.

No. 23331

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, ET AL.,
Appellees.

No. 23335

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL.,
Appellees.

Appeals from the United States District Court for the Northern District of Alabama.

No. 23274

UNITED STATES OF AMERICA,
Appellant,

versus

CADDO PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23365

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOSSIER PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23173

MARGARET M. JOHNSON, ET AL.,
Appellants,

versus

JACKSON PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23192

YVORNIA DECAROL BANKS, ET AL.,
Appellants,

versus

CLAIBORNE PARISH SCHOOL BOARD, ET AL.,
Appellees.

No 23253

JIMMY ANDREWS, ET AL.,
Appellant,
versus
CITY OF MONROE, LOUISIANA, ET AL.,
Appellees.

Appeals from the United States District Court for the Western District of Louisiand.

No. 23116

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Appellants,
versus
EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

On Petitions for Rehearing En Banc

(March 29, 1967.)

Before TUTTLE, Chief Judge, BROWN, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, and SIMPSON, Circuit Judges.

PER CURIAM: 1. The Court sitting en banc adopts the opinion and decree filed in these cases December 29, 1966, subject to the clarifying statements in

this opinion and the changes in the decree attached to this opinion.

2. School desegregation cases involve more than a dispute between certain Negro children and certain schools. If Negroes are ever to enter the mainstream of American life, as school children they must have equal educational opportunities with white children.

3. The Court holds that boards and officials administering public schools in this circuit[1] have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinions distinguishing between integration and desegregation[2] must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The

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1. "In the South," as the Civil Rights Commission has pointed out, the Negro "has struggled to get into the neighborhood school. In the North, he is fighting to get out of it." Civ. Rts. Comm. Rep., Freedom to the Free, 207 (1963).

This Court did not "excuse" neighborhood schools in the North and West which have de facto segregation. No case involving that sort of school system was before the Court.

School segregation is "inherently unequal" by any name and wherever located. But de facto segregation resulting from residential patterns in a non-racially motivated neighborhood school system has problems peculiar to such a system. The school system is already a unitary one. The difficulties lie in finding state action and in determining how far school officials must go and how far they may go in correcting racial imbalance. In such cases *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) may turn out to be as important as *Brown*. A broad-brush doctrinaire approach, therefore, that *Brown's* abolition of the dual school system solves all problems is conceptually and pragmatically inadequate for dealing with de facto-segregated neighborhood schools.

We leave the problems of de facto segregation in a unitary system to solution in appropriate cases by the appropriate courts.

2. This distinction was first expressed in Briggs v. Elliott, E.D.S.C. 1955, 132 F. Supp. 776: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties, facilities, and activities, as well as students. To the extent that earlier decisions of this Court (more in the language of the opinion than in the effect of the holding) conflict with this view, the decisions are overruled. We refer specifically to the cases listed in footnote 2 of this opinion.[3]

4. Freedom of choice is not a goal in itself. It is a means to an end. A schoolchild has no inalienable right to choose his school. A freedom of choice plan is but one of the tools available to school officials *at this stage* of the process of converting the dual system of separate schools for Negroes and whites into a unitary system. The governmental objective of this conversion is—educational opportunities on equal terms to all. The criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing this objective.

5. The percentages referred to in the Guidelines and in this Court's decree are simply a rough rule of thumb for measuring the effectiveness of freedom of choice as a useful tool. The percentages are not a method for setting quotas or striking a balance. If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; they should try other tools.

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3. Avery v. Wichita Falls Independent School District, 1956, 241 F.2d 230; Borders v. Rippy, 1957, 247 F.2d 268; Rippy v. Borders, 1957, 257 F.2d 73; Cohen v. Public Housing Administration, 1958, 257 F.2d 73; City of Montgomery v. Gilmore, 1960, 277 F.2d 364; Boson v. Rippy, 1960, 285 F.2d 34; Stell v. Savannah-Chatham County Board of Education, 1964, 333 F.2d 55; Evers v. Jackson, 1964, 328 F.2d 408; Lockett v. Board of Education of Muscogee County, 1965, 342 F.2d 225.

6. In constructing the original and revised decrees, the Court gave great weight to the 1965 and 1966 HEW Guidelines. These Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation. These Guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and meet the requirements of the United States Constitution. Courts in this circuit should give great weight to future HEW Guidelines, when such guidelines are applicable to this circuit and are within lawful limits. We express no opinion as to the applicability of HEW Guidelines in racially imbalanced situations such as occur in some other circuits where it is contended that state action may be found in state tolerance of de facto segregation or in such action as the drawing of attendance boundaries based on a neighborhood school system.

The Court reaffirms the reversal of the judgments below and the remand of each case for entry of the decree attached to this opinion.

The mandate will issue immediately.

CORRECTED DECREE

It is ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of the dual school system:

I.

SPEED OF DESEGREGATION

Commencing with the 1967-68 school year, in accordance with this decree, all grades, including kindergarten grades, shall be desegregated and pupils assigned to schools in these grades without regard to race or color.

II.

EXERCISE OF CHOICE

The following provisions shall apply to all grades:

(a) *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this decree to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

(b) *Annual Exercise of Choice.* All students, both white and Negro, shall be required to exercise a free choice of schools annually.

(c) *Choice of Period.* The period for exercising choice shall commence May 1, 1967 and end June 1, 1967, and in subsequent years shall commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period shall be

given any preference because of the time within the period when such choice was exercised.

(d) *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period shall not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who exercised choice before the expiration of the choice period. Any student who has not exercised his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available under standards for determining available space which shall be applied uniformly throughout the system.

(e) *Public Notice.* On or within a week before the date the choice period opens, the defendants shall arrange for the conspicuous publication of a notice describing the provisions of this decree in the newspaper most generally circulated in the community. The text of the notice shall be substantially similar to the text of the explanatory letter sent home to parents. Publication as a legal notice will not be sufficient. Copies of this notice must also be given at that time to all radio and television stations located in the community. Copies of this decree shall be posted in each school in the school system and at the office of the Superintendent of Education.

(f) *Mailing of Explanatory Letters and Choice Forms.* On the first day of the choice period there shall be distributed by first-class mail an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the defendants) of each student, together with a return envelope addressed to the Superintendent. Should the defendants satisfactorily demonstrate to the court that they are unable to comply

with the requirement of distributing the explanatory letter and choice form by first-class mail, they shall propose an alternative method which will maximize individual notice, i.e., personal notice to parents by delivery to the pupil with adequate procedures to insure the delivery of the notice. The text for the explanatory letter and choice form shall essentially conform to the sample letter and choice form appended to this decree.

(g) *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form shall be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

(h) *Content of Choice Form.* Each choice form shall set forth the name and location and the grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of *one* parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, may be required or requested, without approval of the court.

(i) *Return of Choice Form.* At the option of the person completing the choice form, the choice may be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

(j) *Choices not on Official Form.* The exercise of choice may also be made by the submission in like man-

ner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

(k) *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices from their children under the conditions set forth in paragraph II (a) of this decree and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student. A change in family residence from one neighborhood to another shall be considered an exceptional case for purposes of this paragraph.

(l) *Preference in Assignment.* In assigning student to schools, no preferences shall be given to any student for prior attendance at a school and, except with the approval of court in extraordinary circumstances, no choice shall be denied for any reason other than overcrowding. In case of overcrowding at any school, preference shall be gven on the basis of the proximity of the school to the homes of the students choosing it, without regard to race or color. Standards for determining overcrowding shall be applied uniformly throughout the system.

(m) *Second Choice where First Choice is Denied.* Any student whose choice is denied must be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student shall have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

(n) *Transportation.* Where transportation is generally provided, buses must be routed to the maximum

extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or the formerly Negro school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

(o) *Officials not to Influence Choice.* At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any person because of a choice made. If the defendant school board employs professional guidance counselors, such persons shall base their guidance and counselling on the individual student's particular personal, academic, and vocational needs. Such guidance and counselling by teachers as well as professional guidance counsellors shall be available to all students without regard to race or color.

(p) *Protection of Persons Exercising Choice.* Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board shall not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this decree. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

III.

PROSPECTIVE STUDENTS

Each prospective new student shall be required to exercise a choice of schools before or at the time of enrollment. All such students known to defendants shall be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Where there is no pre-registration procedure for newly entering students, copies of the choice forms shall be available at the Office of the Superintendent and at each school during the time the school is usually open.

IV.

TRANSFERS

(a) *Transfers for Students.* Any student shall have the right at the beginning of a new term, to transfer to any school from which he was excluded or would otherwise be excluded on account of his race or color.

(b) *Transfers for Special Needs.* Any student who requires a course of study not offered at the school to which he has been assigned may be permitted, upon his written application, at the beginning of any school term or semester, to transfer to another school which offers courses for his special needs.

(c) *Transfers to Special Classes or Schools.* If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded, or gifted children, the defendants may assign children to such schools or classes on a basis related to the function of the special class or school that is other than freedom of choice. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

V.

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, nonracially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race or color. All special educational programs conducted by the defendants shall be conducted without regard to race or color.

VI.

SCHOOL EQUALIZATION

(a) *Inferior Schools.* In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools pre-

viously maintained for white students. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this paragraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice. By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools.

(b) *Remedial Programs.* The defendants shall provide remedial education programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education.

VII.

NEW CONSTRUCTION

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system.

VIII.

FACULTY AND STAFF

(a) *Faculty Employment.* Race or color shall not be a factor in the hiring, assignment, reassignment, pro-

motion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of faculty and staff in the dual system. Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty. Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year notwithstanding that teacher contracts for the 1967-68 or 1968-69 school years may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The defendants shall establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) *Dismissals.* Teachers and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school

system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

(c) *Past Assignments.* The defendants shall take steps to assign and reassign teachers and other professional staff members to eliminate the effects of the dual school system.

IX.

REPORTS TO THE COURT

(1) *Report on Choice Period.* The defendants shall serve upon the opposing parties and file with the Clerk of the Court on or before April 15, 1967, and on or before June 15, 1967, and in each subsequent year on or before June 1, a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report shall also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

In addition, the report shall show the percentage of pupils actually transferred or assigned from segregated grades or to schools attended predominantly by pupils of a race other than the race of the applicant, for attendance during the 1966-67 school year, with comparable data for the 1965-66 school year. Such additional information shall be included in the report served upon opposing counsel and filed with the Clerk of the Court.

(2) *Report After School Opening.* The defendants shall, in addition to reports elsewhere described, serve upon opposing counsel and file with the Clerk of the Court within 15 days after the opening of schools for the fall semester of each year, a report setting forth the following information:

(i) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken by the defendants on his request and the reasons therefor.

(ii) The number of faculty vacancies, by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this sub-paragraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(iii) The number of students by race, in each grade of each school.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next year. Any student who will be entering one of these grades next year may choose to attend any school in our

system, regardless of whether that school was formerly all-white or all-Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 1, 1967. You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or to the Office of the Superintendent at any time between May 1 and June 1. No one may require you to return your choice form before June 1 and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. [Delete if the school system does not provide transportation.]

Your School Board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out successfully.

Sincerely yours,

Superintendent

CHOICE FORM

This form is provided for you to choose a school for your child to attend next year. You have 30 days to make your choice. It does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or Negro school. This form must be mailed or brought to the principal of any school in the system or to the office of the Superintendent, [address], by June 1, 1967. A choice is required for each child.

Name of child .....
(Last) (First) (Middle)

Address .....

Name of Parent or other adult serving as parent .....

If child is entering first grade, date of birth:

.....
(Month) (Day) (Year)

Grade child is entering .....

School attended last year .....

Choose one of the following schools by marking an X beside the name.

Name of School	Grade	Location
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

Signature .....

Date .....

.....

.....

To be filled in by Superintendent:

School Assigned .....[1]

GEWIN, Circuit Judge, with whom Judge Bell concurs, DISSENTING:

The opinion of the majority and the proposed decree are long, complicated, somewhat ambiguous and rather confusing. The per curiam opinion of the majority of the en banc court does not substantially clarify, modify or change anything said in the original opinion filed December 29, 1966. Only minor and inconsequential changes were made in the proposed decree.[1] In my view both the opinion and decree constitute an abrupt and unauthorized

1. In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

1. "The opinion" and "the decree" as used herein refer to the opinion and decree filed in these cases by the three judge panel on December 29, 1966, wherein two of the judges agreed and one dissented. Of necessity, references to page numbers of the opinion refer to the slip opinion.

departure from the mainstream of judicial thought both of this Circuit and a number of other Circuits. I am unable to agree either with the opinion or the decree, especially those provisions dealing with the following: (1) de facto and de jure segregation; (2) the guidelines; (3) the proposed decree; (4) attendance percentages, proportions, and freedom of choice; and (5) enforced integration.

I.

De Facto and De Jure Segregation

The thesis of the majority, like Minerva (Athena) of the classic myths,[2] was spawned full-grown and full-armed. It has no substantial legal ancestors.[3] We must wait to see what progeny it will produce.

While professing to fashion a remedy under the benevolent canopy of the Federal Constitution, the opinion and the decree are couched in divisive terms and proceed to dichotomize the union of states into two separate and distinct parts. Based on such reasoning the Civil Rights Act of 1964 is stripped of its national character, the national policies therein stated are nullified, and in effect, the remedial purposes of the Act are held to apply to approximately one-third of the states of the Union and to a much smaller percentage or proportion of the total popu-

2. See Gayley, The Classic Myths (Rev. ed. 1939), page 23 "She sprang from the brain of Jove, agleam with panoply of war, brandishing a spear and with her battle-cry awakening the echoes of heaven and earth."

3. However, compare the doctrine of the majority and the theme of an article in the Virginia Law Review entitled "Title VI, The Guidelines and School Desegregration in the South", by James R. Dunn. Virginia Law Review, Vol. 53, page 42. (1967). According to footnote 85 of the law review article, the majority opinion was released "as this article was going to press." Mr. Dunn is Legal Adviser, Equal Educational Opportunities Program, United States Office of Education, HEW, Washington, D.C.

lation of the country. I am unable to believe that the Congress had any such intent. If it did, a serious constitutional question would be presented as to the validity of the entire Act under our concepts of American constitutional government.

The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or in any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because they were born into a de facto society, while the exact same racial make-up of the school system in the 17 Southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area of the country, also violates such constitutional rights in another area. The details of the remedy to be applied, however, may vary with local conditions. Basically, all of them must be given the same constitutional protection. Due process and equal protection will not tolerate a lower standard, and surely not a double standard. The problem is a national one.

Regardless of our decrees, in spite of our hopes and notwithstanding our disappointments, there is no infallible and certain process of alchemy which will erase decades of history and transmute a distasteful set of circumstances into a utopia of perfection. All who have studied the subject recognize that discriminatory practices did not arise from a single cause. Such practices had their origin and birth in social, economic, educational, legal, geographical and numerous other considerations.

These factors tend to be self-perpetuating. We must eradicate them, and I have the faith that they will be eradicated and eliminated by responsible and responsive governmental agencies acting pursuant to the best interests of the community. There is no social antibiotic which will effect a sudden or overnight cure. It is not possible to specifically fix the blame or to attribute the origin of discriminatory practices to isolated causes, and it is surely inappropriate to undertake to fasten guilt upon any segment of the population. In this area of our nation's history eminent historians still disagree as to causes and effects. Some studies have placed emphasis on the slave trader or the importer of slaves, others have blamed the slave holder, while others have tried to trace the guilt back to tribal chieftains in Africa. Perhaps the most common understanding amongst all the historians and students of the problem is the conclusion that causes cannot be isolated and responsibility cannot be limited to a particular group. Whatever the cause or explanation, it is clear that the responsibility rests on many rather than few.

At this time, almost 13 years after the decisions in *Brown* v. *Board of Education* (1954) 347 U.S. 483, 98 L.ed. 873 (*Brown I*) and *Brown* v. *Board of Education* (1955) 349 U.S. 294, 99 L.ed. 1083 (*Brown II*), there should be no doubt in the minds of anyone that compulsory segregation in the public school systems of this nation must be eliminated. Negro children have a personal, present, and unqualified constitutional right to attend the public schools on a racially non-discriminatory basis.

Although espousing the cause of uniformity and asserting there must not be one law for Athens and another for Rome, the opinion does not follow that thesis or principle. One of the chief difficulties which I encounter with

the opinion is that it concludes that the Constitution means one thing in 17 states of the nation and something else in the remaining states. This is done by a rather ingenious though illogical distinction between the terms de facto segregation and de jure segregation. While the opinion recognizes the evils common to both types, it relies heavily on background facts to justify the conclusion that the evil will be corrected in one area of the nation and not in the other. In my view the Constitution cannot be bent and twisted in such a manner as to justify or support such an incongruous result. The very subject matter under consideration tends to nullify the assertion that the constitutional prohibition against segregation should be applied in 17 states and not in the rest of the nation.

Legislative history clearly supports the idea that no distinction should be made with respect to the various states in dealing with the problem. Senator Pastore was one of the principal spokesmen who handled this legislation. He gave the following explanation:

> "Frankly, I do not see how we could have gone any further, to be fair . . . Section 602 of Title VI, not only requires the agency to promulgate rules and regulations but all procedure must be in accord with these rules and regulations. They must have broad scope. They must be national. They must apply to all fifty states. We could not draw one rule to apply to the State of Mississippi, another rule to apply to the State of Alabama, and another rule to apply to the State of Rhode Island. There must be only one rule, to apply to every state. Further, the President must approve the rule." (110 Cong. Rec. 7059, April 7, 1964)
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> * * *
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> "MR. PASTORE . . . We must do what Title VI provides; and we could do it in no milder form than that

> now provided by Title VI. The Senator from Tennessee says, 'Let us read this title'. I say so, too. When we read these two pages, we understand that the whole philosophy of Title VI is to promote voluntary compliance. It is written right in the law. There shall be the voluntary compliance as the first step, and then the second step they must inaugurate and promulgate, rules that have a national effect, not a local effect. They shall apply to Tennessee, to Louisiana, to Rhode Island, in equal fashion." (110 Cong. Rec. 7066, April 7, 1964)

In connection with the distinction which the opinion undertakes to make, it is pertinent to observe the following strong and unequivocal pronouncement in the very beginning of the decision in *Brown II*:

> "All provisions of *federal, state, or local* law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded." (Emphasis added) (page 298)

It should be observed that all public school segregation was de jure in the broad sense of that term prior to the first *Brown* decision, in that segregation was permitted, if not required, by law.

It is undoubtedly true that any problem which reaches national proportions is often generated by varying and different customs, mores, laws, habits and manners. Such differences in the causes which contributed to the creation and existence of the problem in the first instance, do not justify the application of a fundamental constitutional principle in one area of the nation and a failure to apply it in another.

While all the authorities recognize the existence and operation of different causes in the historical background of racial segregation, there are also marked similarities.

This fact is noted in the recently released study by the United States Commission on Civil Rights, RACIAL ISOLATION IN THE SCHOOLS, 1967, Vol. I (pp. 39, 59-79). In discussing the subject the following observation is made early in the report:

> "Today it [racial isolation or segregation] is attributable to remnants of the dual school system, methods of student assignment, residential segregation, and to those discretionary decisions *familiar in the North*—site selection, school construction, transfers, and the determination of where to place students in the event of overcrowding." (Emphasis added)

In its summary the Commission notes that the causes of racial isolation or school segregation are complex and self-perpetuating. It speaks of the *Nation's* metropolitan areas and refers to social and economic factors as well as geographical ones. According to the summary, not only do *state and local* governments share the blame, it is categorically asserted that "The *Federal Government* also shares in this responsibility." (Emphasis added) Pertinent similarities in the problem, applicable to the entire nation, are forcefully asserted in the final sentence of the Commission's Summary:

> "*In the North*, where school segregation was not generally compelled by law, these [discriminatory] policies and practices have helped to increase racial separation. *In the South*, where until the Brown decision in 1954 school segregation was required by law, *similar policies and practices* have contributed to its perpetuation." (Emphasis added)

By a process of syllogistic reasoning based on fatally defective major premises the opinion has distorted the meaning of the term segregation and has segmented its meaning into de facto and de jure segregation. All seg-

regation in the South is classified as de jure[4] while segregation in the North is classified as de facto. Different rules apply to the different types of segregation. The South is heavily condemned. The opinion approaches the problem on a sectional basis and fails to consider the subject except on a sectional or regional basis. There are many references to "the eleven" Southern states and "the seven" border states. This area of the nation is variously characterized as "The eleven states of the Confederacy," "the entire region encompassing the southern and border states", "wearing the badge of slavery", and "apartheid". Finally, the opinion concludes that the two types of segregation are different, have different origins, create different problems and require different corrective action. It is suggested that there is no present remedy for de facto segregation but that the problems and questions arising from de facto segregation may someday be answered by the Supreme Court.[5]

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4. At one place in the opinion *pseudo* de facto segregation in the South is mentioned, but it is asserted that any similarity between pseudo de facto segregation in the South and actual de facto segregation in the North is more apparent than real. (p. 68)

5. The case of Blocker v. Bd. of Educ. of Manhasset, N.Y. (E.D. N.Y. 1964) 226 F. Supp. 208 cited and relied on by the majority does not support the de facto-de jure distinction. In fact Judge Zavatt disavows any such distinction. The following is from the opinion:

> "On the facts of this case, the separation of the Negro elementary school children is segregation. It is segregation by law—the law of the School Board. In the light of the existing facts, the continuance of the defendant Board's impenetrable attendance lines amounts to nothing less than state imposed segregation."
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> * * *
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> "This segregation is attributable to the State. The prohibitions of the Fourteenth Amendment 'have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. * * * Whoever, by virtue of public position under a State government, * * * takes away the equal protection of the

This Court, and the district courts within the six states embraced within our jurisdiction like many other federal courts of the nation have given much time and attention to the solution of the problems arising after the *Brown* decisions. Much has been accomplished, much remains to be done. It is not possible for me to join in the expressions of pessimism contained in the opinion or to approve the insinuations that the courts have failed in the performance of their duty.[6] Even Congress is taken to task for failure to act earlier and for failure to recognize school desegregation "as the law of the land."[7] In the

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laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' Ex Parte Virginia, 100 U.S. 339, 346-347, 25 L.Ed. 676, 679 (1880). 'The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.' Cooper v. Aaron, supra, 358 U.S. at 16, 78 S.Ct. at 1408, 3 L.ed.2d 5."

6. See for example the following statements from the opinion:

"The courts acting alone have failed." (p. 7)

* * *

"Quantitatively, the results were meager." (pp. 20-21)

* * *

"And most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers." (p. 24)

* * *

"In some cases there has been a substantial time-lag between this Court's opinions and their application by the district courts. In certain cases—which we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional initial assignment—satisfy the requirements of a desegregation plan." (p. 36)

7. See item (5), page 24 of the opinion:

"(5) But one reason more than any other has held back desegregation of public schools on a large scale. This has been the lack, until 1964, of effective congressional statutory recognition of school desegregation as the law of the land."

Brown cases the Court clearly and wisely recognized the fact that those decisions had changed the law which had been in effect for decades. Due notice was taken of the fact that the new order of the day would "involve a variety of local problems." The court recognized "the complexities arising from the transition to a system of public education freed of racial discrimination." Moreover, the Court stated, "Full implementation of these constitutional principles may require solution of varied local school problems." The courts were instructed to be "guided by equitable principles," to give consideration to "practical flexibility in shaping remedies" and observed that equity courts have a peculiar "facility for adjusting and reconciling public and private needs." The *Brown* decisions emphasized the concept that courts of equity are particularly qualified to shape such remedies as would "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles" pronounced in the first *Brown* decision. Contrary to the tone and expressions of the majority opinion, the Supreme Court early announced the policy of heavy reliance on the district courts and that policy has continued to this date.

II.

Guidelines

With respect to the guidelines, it should be noted that they were not an issue presented to the District Court. The cases here involved had been tried in the respective district courts, appeals taken to this Court and were pending on the docket of this Court before the 1966 Guidelines were promulgated. Guidelines were not made an issue by the pleadings or otherwise in the district courts and no evidence was taken with respect to them. The issue

of the guidelines are before this Court because the Court, sua sponte, brought the issue before it.[8] In my view their validity is not an issue to be decided in this Court. See *United States* v. *Petrillo* (1947) 332 U.S. 1, 5, 6; *United States* v. *International Union*, (1957) 352 U.S. 567, 590; *Connor* v. *New York Times* (5 Cir. 1962) 310 F.2d 133, 135; *Gibbs* v. *Blackwell* (5 Cir. 1965) 354 F.2d 469, 471.

In its first approach to the question the Court indicated that it would not pass upon the constitutionality of the guidelines but would give weight to or rely upon them as a matter of judicial policy. When confronted with the fact that the guidelines were not approved by the President as required by the Civil Rights Act of 1964, the opinion then concluded that they do not constitute or purport to be rules or regulations or orders of general application. It was then stated that since they were not a rule, regulation or order, they constitute "a statement of policy", and while HEW "is under no statutory compulsion to issue such statements" it was decided that it is "of manifest advantage" to the general public to know the basic considerations which the Commissioner uses "in determining whether a school meets the requirements for eligibility to receive financial assistance." Immediately the opinion recognizes the inherent unfairness and vices of such pronouncements of administrative policy without an evidentiary hearing. "The guidelines have the vices of all

8. See opinion, page 10, footnote 13.

It should be noted that when the panel which originally heard this case invited briefs no mention was made of any constitutional question or issue with respect to the HEW guidelines. Rather, the questions posed related to whether it was "permissible and desirable" for the court to give weight to or rely on the guidelines; and if so, what practical means or methods should be employed in making use of the guidelines. From the questions raised by the court, counsel could not have gained the impression that the court was to make a full scale determination of the constitutional questions involved.

administrative policies established unilaterally without a hearing."[9] Finally, the opinion concludes that the guidelines are fully constitutional, recognizing as it is bound to do, that a failure to comply with them cuts the purse strings and closes the treasury to all who fail to comply:

> "The great bulk of the school districts in this circuit have applied for federal financial assistance and therefore operate under voluntary desegregation plans. Approval of these plans by the Office of Education qualifies the schools for federal aid. *In this opinion we have held that the HEW Guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights Act of 1964.* Schools therefore, in compliance with the Guidelines can in general be regarded as discharging constitutional obligations." (Emphasis added) (p. 112)

Whether viewed from a substantive or procedural point of view, due process and sound judicial administration require, at the very least, an evidentiary hearing on a matter so vital to so many people.[10] Not only are nu-

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9. See opinion page 30.

10. The 1966 Guidelines were promulgated on March 7, 1966, after these cases were docketed in this Court. The fact that the appellees had no opportunity to have a hearing and that the guidelines were unilaterally issued without receipt of evidence from the numerous school districts was called to the attention of this Court by one of the briefs for appellees:

> "As pointed out in detail below, the Constitutional and legislative principles applicable to the expenditures of federal funds, the legislative and administrative discretion placing conditions upon the receipt and use thereof, the lack of due process in the adoption thereof and the lack of any opportunity to be heard by those affected thereby all render such Guidelines inapplicable to the pending cases."
>
> * * *
>
> "The 1966 Guidelines (as well as the 1965 Guidelines) were not approved by the President. They were issued by the Office of Education unilaterally without an opportunity for the representatives of the thousands of school districts affected thereby to be heard. As unilateral directives they have not been subject to judicial review."

See consolidated brief Jefferson County Board of Education, pp. 76-77.

merous people affected, but those most affected are the school children of the nation. The most vital segment of our democratic society is our school system. The operation and administration of the public school systems of this nation are essentially a local business. It is unthinkable that matters that so vitally affect this phase of the national welfare should be decided in such summary fashion. In the two most recent pronouncements by the Supreme Court dealing with the problem of segregation as related to faculty and staff, that Court refused to act without an evidentiary hearing. In both decisions the cases were remanded to the district court "for evidentiary hearings." *Bradley* v. *School Bd. of Richmond* (1965) 382 U.S. 103, 15 L.ed.2d 187; *Rogers* v. *Paul* (1965) 382 U.S. 198, 15 L.ed.2d 265. Similarly, in *Calhoun* v. *Latimer* (1964) 377 U.S. 263, 12 L.ed.2d 288, the Court had for consideration a desegregation plan of the Atlanta Board of Education. During the argument before the Supreme Court counsel for the Board of Education informed the Court that subsequent to the decision of the lower court, the Board had adopted additional provisions authorizing "free transfers with certain limitations in the city high schools". The petitioners contended that the changes did not meet constitutional standards and asserted that with respect to elementary students the changed plan would not achieve desegregation until sometime in the 1970's. The Supreme Court did not "grasp the nettle" but vacated the order of the lower court and remanded the case to "be appraised by the district court in a *proper evidentiary hearing.*" (Emphasis added)

III.

Decree

I now come to a consideration of the decree ordered to be entered and its relation to the opinion. It is im-

possible to consider the decree and the opinion separately; they are inextricably interwoven. Neither takes into account "multifarious local difficulties", and therefore, any particular or peculiar local problems are submerged and sacrificed to the apparent determination, evident on the face of both the opinion and the decree, to achieve percentage enrollments which will reflect the kind of racial balance the opinion seeks to achieve.

The opinion asserts that uniformity must be achieved forthwith in everyone of the six states embraced within the Fifth Circuit. No consideration is given to any distinction in any of the numerous school systems involved. Urban schools, rural ones, small schools, large ones, areas where racial imbalance is large or small the relative number of Negro and white children in any particular area, or any of the other myriad problems which are known to every school administrator, are taken into account. All things must yield to speed, uniformity, percentages and proportional representation. There are no limitations and there are no excuses. This philosophy does not comport with the philosophy which has guided and been inherent in the segregation problem since *Brown II*. As the Court there stated:

> "Because these cases arose under *different local conditions* and their disposition will involve a variety *of local problems*, we required further *argument* on the question of relief." (p. 298) (Emphasis added)

See also *Davis* v. *Bd. of Comm. of Mobile Co., Ala.*, 322 F.2d 356 (5 Cir. 1963) wherein this Court made a distinction in the rural and urban schools of Mobile County, Alabama. We held:

> "The District Court may modify this order to defer desegregation of rural schools in Mobile County until September 1964, should the District Court after further

hearing conclude that special planning of administrative problems for rural schools in the county make it impracticable for such schools to start desegregation in September 1963."

The effectiveness of the district courts has been seriously impaired, in a real sense, contrary to the teachings of all the decisions of the Supreme Court since *Brown II*. Under the opinion and decree a United States District Judge serves essentially as a referee, master, or hearing examiner. Now his only functions are to order the enforcement of the detailed, uniform, stereotyped formal decree, to supervise compliance with its detailed provisions as therein ordered and directed, and to receive periodic reports much in the same fashion as reports are received by an ordinary clerk in a large business establishment.

Such a detailed decree on the appellate level not only violates sound concepts of judicial administration, but it violates a longstanding philosophy of the federal judicial system, and indeed all judicial systems common to this country, which vest wide discretion and authority in trial courts because of their closeness to and familiarity with local problems. See the opinions in *Brown II*, *Bradley*, *Rogers*, and *Calhoun*. For example, in *Brown II* the Court stated:

"Full implementation of these constitutional principles may require solution of *varied local school* problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of *their proximity to local conditions* and the possible need for further hearings, *the courts which originally heard these cases can best perform this judicial appraisal.* Accordingly, we believe it appropriate to remand the cases to those courts.

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been *characterized by a practical flexibility* in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of *these traditional attributes of equity power*. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a *variety of obstacles* in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision." (Emphasis added)

The opinion asserts that "most judges" do not possess the necessary competence to deal with the questions presented, and do not "know the right questions, much less the right answers." Notwithstanding the foregoing assertion, the judges of the majority, acting on the appellate level, proceed to fashion a decree of such minute detail and specificity as to remove all discretion and authority from the district judges on whom the Supreme Court has relied so heavily. In my view the district judges are in much better position to know the questions and the answers than appellate judges who necessarily function some distance away from an evidentiary hearing and are removed from the "multifarious local problems" and "the variety of obstacles" inherent in the solution of the issues presented.

IV.

Percentages, Proportions and Freedom of Choice

Freedom of choice means the unrestricted, uninhibited, unrestrained, unhurried, and unharried right to choose where a student will attend public school subject only to administrative considerations which do not take into account or are not related to considerations of race. If there is a free choice, free in every sense of the word, exercised by stu-

dents or by their parents, or by both, depending on the circumstances, in accordance with a plan fairly and justly administered for the purpose of eliminating segregation, the dual school system as such will ultimately disappear." *Goss* v. *Board of Education*, 373 U.S. 683 (1963); *Bradley* v. *School Board*, 345 F.2d 310, 318 (4 Cir. 1965), vacated and remanded on other grounds 382 U.S. 108 (1965 per curiam). See also *Clark* v. *Board of Educ. of Little Rock*, 369 F.2d 661 (8 Cir. 1966); *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55, 59 (6 Cir. 1966); *Lee, et al.* v. *Macon County Board of Education, et al.* (D.C. M.D. Ala. 1967) C.A. 604-E, ... F. Supp. ..... If the completely free choice is afforded and neither the students nor their parents desire to change the schools the students have heretofore attended, this Court is without authority under the Constitution or any enactment of Congress to compel them to make a change. Implicit in freedom of choice is the right to choose to remain in a particular school, perhaps the school heretofore attended. That in itself is the exercise of a free choice. The fact that Negro children may not choose to leave their associates, friends, or members of their families to attend a school where those associates are eliminated does not mean that freedom of choice does not work or is not effectively afforded. The assertion by the majority that "the only school desegregation plan that meets Constitutional standards is one that works" as interpreted by that opinion, simply means that students and parents will not be given a free choice if the results envisioned by the majority are not actually achieved. There must be a mixing of the races according to majority philosophy even if such mixing can only be achieved under the lash of compulsion. If the percentage of Negro and white children attending a particular school does not conform to the percentage of Negro and white school population prevalent in the community, the majority concludes that the plan of desegregation does not work. Accordingly, while professing to vouchsafe

freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike. There must be a mixing of the races, or integration at all costs, or the plan does not work according to the opinion. Such has not been and is not now the spirit or the letter of the law.

The aim and attitude of the majority is reflected by the following statement:

> "In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the Guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect 15 to 18 per cent of the pupil population to have selected desegregated schools."

Further the Court equates the percentage attendance test with percentages in jury exclusion[11] cases and voter registration cases. It should be pointed out that such cases had no element of free choice in them, and therefore, the comparison is inapposite. In the instant cases the majority

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11. One of the leading and most recent cases on jury exclusion is Swain v. Alabama (1965) 380 U.S. 202, 13 L.ed.2d 759. With respect to proportional representation on juries the Court concluded:

> "Venires drawn from the jury box made up in this manner unquestionably contained a smaller proportion of the Negro community than of the white community. But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which the petit jurors are drawn." (p. 208)

Further, the Court in *Swain* quoted with approval the following statement from Cassell v. Texas, 339 U.S. 282, 286-287, 94 L.ed. 839, 847:

> "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible."

condemns a free choice plan unless it achieves the percentage result which suits the majority. Accordingly, the opinion concludes:

> "Percentages have been used in other civil rights cases. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools. Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system."

There is no constitutional requirement of proportional representation in the schools according to race. Furthermore, since there can be no exclusion based on race, proportional limitation is likewise impermissible under the Constitution.

We should be concerned with the elimination of discrimination on account of race, and freedom of choice is one means of accomplishing that goal. It is not our function to condemn the children or the school authorities because the free choices actually made do not comport with our own notions of what the choices should have been. When our concepts as to proportions and percentages are imposed on school systems, notwithstanding free choices actually made, we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly claim to espouse and embrace. Our duty in seeking to eliminate racial discrimination is to vouchsafe to all children, regardless of race, a full, complete and timely free choice of schools in appropriate cases in keeping with sound administrative practices which take into consideration proper criteria. Both proportional representation and proportional limitation are equally unconstitutional.

V.

Enforced Integration

The opinion seeks to find a Congressional mandate requiring compulsory or enforced integration in the public schools as distinguished from the elimination of segregation. Throughout the opinion there appear a tangled conglomeration of words and phrases of various shades of meaning, all of which are equated with each other to reach the conclusion desired by the majority that school boards in this Circuit must adopt and implement a plan of forced integration.

It seems appropriate to return to the Civil Rights Act of 1964 and the legislative history which spawned its enactment in order to ascertain the true Congressional intent. Section 401(b), 42 U.S.C.A. § 2000c(b) defines desegregation in unequivocal terms:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Section 407(a)(2) of Title IV, Title 42 § 2000c-6(a)(2) provides as follows:

> ". . . provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such *racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.*" (Emphasis added)

It should be noted that the portion of the language of the proviso which is underscored is omitted in the court's

opinion. As to enforced integration the following statement by Senator Humphrey is exactly in point:

> "Mr. Humphrey . . . I should like to make one further reference to the *Gary* case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration . . . The bill does not attempt to integrate the schools but it does attempt to eliminate segregation in the schools . . . The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of Section 4." (110 Congressional Record 12717)

Likewise with respect to Section 407(a)(2) Senator Humphrey's statement clarifies and makes plain the Congressional intent by referring to the *Gary* case.[12]

The following additional excerpts from the legislative history serve to clarify the intent of Congress. Congressman Celler, Chairman of the Judiciary Committee of the House and Floor Manager of the bill:

> "There is no authorization for either the Attorney General or the Commissioner of Education to work toward achieving racial balance in given schools." (110 Congressional Record 1519, January 31, 1964)

Senators Byrd and Humphrey:

> "MR. BYRD of West Virginia. But would the Senator from Minnesota also indicate whether the words 'provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance' would preclude the Office of Education, under section 602 or Title VI,

12. Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (1963).

from establishing a requirement that school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?

"MR. HUMPHREY. Yes, I do not believe in duplicity. I believe that if we include the language in Title IV, it must apply throughout the Act." (110 Congressional Record, Page 12715, June 4, 1964).

Senator Javits:

"MR. JAVITS . . . Taking the case of the schools to which the Senator is referring, and the danger of envisaging the rule or regulation relating to racial imbalance, it is negated expressly in the bill, which would compel racial balance. Therefore there is no case in which the thrust of the statute under which the money would be given would be directed toward restoring or bringing about a racial balance in the schools. If such a rule were adopted or promulgated by a bureaucrat, and approved by the President, the Senator's State would have an open and shut case under Section 603. That is why we have provided for judicial review. The Senator knows as a lawyer that we never can stop anyone from suing, nor stop any Government official from making a fool of himself, or from trying to do something that he has no right to do, except by remedies provided by law. So I believe it is that set of words which is operative." (110 Congressional Record, Page 12717, June 4, 1964).

Senators Byrd and Humphrey:

"MR. BYRD of West Virginia . . . Cannot the Office of Education, pursuant to carrying out this regulation, deny assistance to school districts wherein racial imbalance exists?

MR. HUMPHREY. Let me read from the substitute: Provided, that nothing herein shall empower any official or court of the United States to issue any order.

MR. BYRD of West Virginia. 'To issue any order', but does it provide that the Office of Education shall not cut off Federal assistance?

MR. HUMPHREY. But in order to cut off Federal assistance, the President would have to issue the order, if the Senator will read Section 602.

MR. BYRD of West Virginia. The words are: No such rule, regulation, or order shall become effective unless and until approved by the President.

MR. HUMPHREY. That is correct.

MR. BYRD of West Virginia. What assurance does the Senator give me that the President will not approve such a requirement?

MR. HUMPHREY. Because I do not believe the President will violate the law." (110 Congressional Record, Page 12715, June 4, 1964).

In order to escape the clear meaning of the quoted statutes and the unquestioned intent of Congress as illustrated by the legislative history, the opinion summarily obliterates any distinction between desegregation and integration. Within the context of the opinion integration means forced or enforced integration. Again the term integration is applied only to *de juré* segregated schools. An analysis of the opinion demonstrates that the process of reasoning used amounts to an unauthorized insertion of the word "de jure" to achieve and maintain the de facto and de jure distinction with which I dealt earlier. By means of this device the opinion converts the Civil Rights Act of 1964 into a new and different concept entirely foreign to its true meaning. I quote several typical excerpts from the opinion:

"We use the terms 'integration' and 'desegregation' of formerly segregated public schools to mean the conversion of a *de jure* segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel: students, faculty, staff, facilities,

programs, and activities." (Emphasis added) (footnote 5, page 6)

* * *

"*The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary nonracial systems—with or without federal funds.*" (Emphasis in orig.) (page 14)

* * *

"Although the legislative history of the statute shows that the floor managers for the Act and other members of the Senate and House cited and *quoted these two opinions* they did so within the context of the problem of *de facto segregation.*" (Emphasis added) (Page 39) [The two cases mentioned are *Briggs* and *Bell.*]

* * *

"As used in the Act, therefore, 'desegregation' refers only to the disestablishment of segregation *in de jure segregated schools.*" (Emphasis added) (page 74)

* * *

"Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana *de facto type of segregation.*" (Emphasis added) (page 80)

Again it should be said that it is not easy to understand the reasoning by which the majority concludes that the Federal Constitution requires integration of formerly *de jure* school systems but does not require the integration of de facto systems. Apparently faced with this dilemma the majority realized that it must challenge the jurisprudence established by *Briggs* v. *Elliott* (E.D. S.C. 1955) 132 F. Supp. 776, and *Bell* v. *School City of Gary* (N.D. Ind. 1963) 213 F. Supp. 819, affirmed 324 F.2d 209 (7 Cir. 1963). The opinion refers to these cases as "two glosses on Brown". The repeated assertions of Senators showing their reliance

upon the two decisions in question give emphasis to the meaning of the teaching of those two cases. Senator Humphrey actually stated that the thrust of Judge Beamer's opinion in the *Gary* case was incorporated into the Civil Rights Act of 1964.[18] The majority disposes of Senator Humphrey's comment and the *Gary* case by asserting that the school districts were drawn without regard to race. The following is from the opinion:

> "Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana de facto type of segregation." (opinion page 80)

While it may be true that the facts in *Gary* showed good faith on the part of the school board, it is likewise true that the Gary school system involved de jure segregation within the meaning of the majority opinion. We quote from Judge Beamer's opinion, 213 F. Supp. at 822:

> "Prior to 1949, Gary had segregated schools in what is commonly known as the Pulaski Complex. Two schools were built on the same campus, one was called Pulaski-East and the other Pulaski-West. One was occupied by Negro students and the other by white students. This was in accordance with the separate but equal policy, then permitted by Indiana law (Burns Indiana Statutes Annotated, 1948 Replacement, Section 28-5104)"

The difficulty of the majority is further increased by virtue of the fact that Judge Beamer cited cases which uphold the *Briggs* doctrine. More important, when the case was affirmed by the Court of Appeals of the Seventh Circuit, the so-called *Briggs* dictum was cited as authority for the court's holding, 324 F.2d at 213.

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13. See opinion page 81.

If the alleged *Briggs* dictum is so clearly erroneous and constitutionally unsound, it is difficult to believe that it would have been accepted for a period of almost twelve years and quoted so many times. Even the majority concedes that the court in *Briggs* was composed of distinguished jurists, Judges Parker, Dobie and Timmerman. If the majority is correct, it is entirely likely that never before have so many judges been misled, including judges of this Court,[14] for so long by such a clear, understandable, direct and concise holding as the language in *Briggs* which the opinion now condemns. The language is straightforward and simple: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

It is interesting also to observe that the Supreme Court has never disturbed the *Briggs* language, although it has had numerous opportunities to do so. As a matter of fact, it has come very close to approving it; if it has not actually done so. In the case of *Shuttlesworth* v. *Birmingham* (N.D. Ala. 1958) 162 F. Supp. 372, 378, the district court speaking through Judge Rives quoted the *Briggs* opinion. The Supreme Court affirmed the judgment. *Shuttlesworth* v. *Birmingham*, 358 U.S. 101.

The majority rule requiring compulsory integration is new and novel, and it has not been accepted by the Supreme Court or by the other Circuits. The rationale of *Briggs* has been approved. *Brown* decisions, *supra; Goss* v. *Bd. of Educ. of Knoxville, supra; Bolling* v. *Sharpe*, 347 U.S. 497, 498; *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230, 231; *Cooper* v. *Aaron*, 358 U.S. 1 (passim); *Scull* v. *Virginia*, 359 U.S. 344, 346; *Wolfe* v. *North Carolina*, 364 U.S. 177, 182; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 349; *Garner* v. *Louisiana*, 368 U.S. 157, 178; *Turner* v. *City of Memphis*, 369 U.S. 350, 353; *Johnson* v. *Virginia*, 373 U.S. 61, 62; *Wright* v.

14. See the very clear dissenting opinion of Judge Cox.

Rockefeller, 376 U.S. 52, 57-58; *Springfield* v. *Barksdale* (1 Cir. 1965) 348 F.2d 261; *Bradley* v. *School Board of Richmond, Va.* (4 Cir. 1965) 345 F.2d 310; *Swann* v. *Charlotte-Mecklenburg Board of Educ.* (4 Cir. 1966) 369 F.2d 29; *Deal* v. *Cincinnati Board of Educ.* (6 Cir. 1966) 369 F.2d 55; *Bell* v. *School City of Gary, Indiana* (7 Cir. 1963) 324 F.2d 209; *Clark* v. *Board of Educ. of Little Rock* (8 Cir. 1966) 366 F.2d 661; *Downs* v. *Board of Educ. of Kansas City* (10 Cir. 1964) 336 F.2d 988, cert. den., 380 U.S. 914.

Conclusion

It is my judgment that the de facto-de jure distinction created in the opinion can not be supported as a matter of law. Percentage or proportional enrollment requirements based on ra[illegible] and enforced integration are in violation of well established constitutional concepts in my opinion.

While it cannot be denied there has been recalcitrance and resistance to desegregation as required by the *Brown* decisions in numerous areas, I cannot share in the pessimism expressed in the opinion. Throughout the country a substantial effort has been made to eliminate segregation and substantial progress has been made. The *Brown* decisions contemplated some difficulties and complexities. A review of the history of the difficulties involved strongly indicate that the greatest problems arise when a start or "break through" is initiated. Recalcitrance and resistance which appeared initially in many areas have now subsided or disappeared. It is also true that the emphasis has shifted properly from "deliberate" to "speed". I continue to have confidence in the local school boards of the nation. While some of them have performed slowly and a few have not performed at all, the vast majority of school boards are composed of conscientious, civic minded, sincere people who are undertaking to do what is best for the school children of the nation. We should not interfere with them unduly.

Furthermore, I continue to have confidence in the judicial system of the country and hold the firm belief that the record of the courts in achieving compliance with the *Brown* decisions demonstrates that the courts have given their prompt, careful and diligent attention to the problems as they have arisen. In my view the heaviest burden has been on the district courts, and inevitably the best solutions will come at the district court level where the judges are in close contact with local complexities, obstacles and problems. The primary responsibility should be left where the *Brown* decisions placed it, with the boards of education under the supervision and guidance of the district courts. This is not to say that the courts should not accord full consideration to the expertise of the Department of Health, Education and Welfare; and we should give due consideration to HEW Guidelines when it is appropriate to do so. However, the provisions of the Civil Rights Act of 1964 should not be by-passed. Rules, regulations and orders of general application should be enacted in accordance with the requirements of due process and school systems should not be penalized by such rules, regulations or orders which are not approved by the President as provided by the Act. It is no answer to say that the guidelines are interpretive regulations or "housekeeping" rules. They are being used and applied as general rules, regulations or orders.

Due to developments in the jurisprudence, particularly with respect to desegregation of faculty and staff the orders of the district courts should be vacated and the causes remanded for further consideration and for evidentiary hearings in the district courts. In effect the appellees recognize the fact that this must be done. We should not reverse the district courts on questions which were not issues before them and fashion our own decree with respect to such issues without any evidentiary basis or without affording an opportunity for the presentation of evidence relating to such issues in the district courts.

Judge BELL, with whom Judge GEWIN joins, DISSENTING:

I respectfully dissent. The two-judge or original opinion of December 20, 1966 is what the majority has adopted. That opinion seriously erodes the doctrine of separation of powers as between the Executive and the Judiciary. Moreover, much of its language is in the nature of overreach and, as such, adds confusion and unrest to the already troubled area of school desegregation. The overtones of compulsory integration and school racial balances in the original opinion can only chill the efforts of school administrators to complete the task of eliminating dual school systems of the South. In addition, the other side of some of the more important holdings of the majority opinion should be considered and those propositions stated which militate against their validity.

The plain intent of the two opinions is to establish a uniform law for the school systems of this circuit. Thus, the opinions must be tested as laws. Their validity and efficacy as laws should be considered in the frame of reference of need, fairness, clarity and what is constitutionally permissible.

It is fundamental in law making that laws should be fair as between people and sections. The requirement that laws be clear in meaning is also a fundamental. We cannot be expected to obey the law if we cannot understand it. Caligula kept the meaning of the laws from the Romans by posting them in narrow places and in small print[1]—it is no different today when the law is couched in vagueness.

Then there is the matter of personal liberty. Under our system of government, it is not to be restricted except

1. Suetonius, The Lives of the Twelve Caesars, (Random House, 1959), pp. 191, 192.

where necessary, in balance, to give others their liberty, and to attain order so that all may enjoy liberty. History records that sumptuary laws have been largely unobserved because they failed to recognize or were needlessly restrictive of personal liberty. Our experiments with sumptuary-like laws are exemplified by the *Dred Scott* decision, 19 How. 393, Reconstruction, and the prohibition laws. All failed.

The majority opinions, considered together, fail to meet the tests of fairness and clarity. The advance approval given to a requirement of compelled integration exceeds what is constitutionally permissible under the Fourteenth Amendment. They cast a long shadow over personal liberty as it embraces freedom of association and a free society. They do little for the cause of education.

It is important, however, that this dissenting opinion not mislead any person having responsibility in the area of school desegregation. The dual system of education must be eliminated. This was ordered in 1955. *Brown* v. *Board of Education of Topeka*, 1955, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083. School boards were told to convert the dual segregated school systems into racially nondiscriminatory school systems. The court pointed to problems that might arise in the transition with respect to the physical condition of school plants, transportation, personnel, and in the revision of school districts and attendance areas into compact areas. This order followed reargument of the question of remedy after the 1954 decision holding segregated education under the separate but equal doctrine unlawful. *Brown* v. *Board of Education*, 1954, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873. After full argument, the transition was ordered. The separate but equal doctrine was already lost and the time for remedy was at hand. Transition was the remedy provided.

Transition to date has in the main consisted of following a freedom of choice plan for pupil assignment. But freedom of choice without faculty desegregation and the elimination of discrimination in buildings, equipment, services and curriculum will not suffice to convert a dual system into a unitary nondiscriminatory system. The slow progress to date toward eliminating dual systems is what has brought about the majority opinions, and is also at the root of the disturbance between the Health, Education, and Welfare Department and many school boards. The objective must be, as the Department of Justice contends, that there be no white schools—no Negro schools—just schools. But this is all that is required and it can be accomplished without the open-end compulsory integration language of the majority opinions, or the geometric progression guidelines[2] of HEW which the majority opinion approves.

The mandate of the Supreme Court in *Brown II* can be carried out by the assignment of faculty and students without regard to race, and by affording equality in educational opportunity from the standpoint of buildings, equipment, and curriculum. Where freedom of choice in student assignment is ineffective to the extent that a dual system continues, it can be implemented by a neighborhood assignment plan. Assignments should then be made by the school board to the school nearest the home of the student, whether formerly white or Negro. Then the child would be given the option under a freedom of choice plan of attending another school with priority to attend being based

2. Even while these cases were pending after en banc argument, HEW announced new guidelines. Now for a school system to receive approval without further investigation, it must show that the number of minority group students in integrated schools within the system in the school years 1967-68 will be double the number present in 1966-67 and in some instances triple the number. New Orleans Times-Picayune, March 16, 1967, page 1, Column 4, Associated Press.

on proximity of residence to school. This method of student assignment is comparable to what is being used in Charlotte. *Cf. Swann* v. *Charlotte-Mecklenburg Board of Education*, 4 Cir., 1966, 369 F.2d 29 (En banc).

We should order the school boards in these cases, which they and the entire court agree must be reversed, to forthwith complete the conversion from dual to unitary systems by the use of these minimum but mandatory directions. School boards and the public would understand the objective—to convert dual school systems into unitary nondiscriminatory systems just as the Supreme Court directed twelve years ago. School boards and the public would also understand the method to be followed in the conversion. But this approach is too simple for the majority. Their view is that something more is required—a result which brings about substantial integration of students. The mandatory assignment of students based on race is the method selected to achieve this result. This is a new and drastic doctrine. It is a new dimension in constitutional law and in race relations. It is new fuel in a field where the old fire has not been brought under control.

PROCEDURAL DUE PROCESS AND THE APPROVAL OF THE GUIDELINES

The scope of the majority holding as to the binding force on the federal courts of the HEW guidelines in the area of school desegregation posed a serious separation of powers question. That fact alone should have indicated that the validity of the HEW guidelines was of primary concern. One of the major premises of the original or panel opinion is that HEW excuses those school systems which are under court order from compliance with its guidelines; hence, the necessity of the court setting the guidelines as minimum standards to prevent the courts from being used as an escape route. The original HEW Regulation promul-

gated in 1964 makes this possible. Title 45A, CFR, § 80.4-(c). The HEW statement of policy of 1965, Title 45, CFR, § 181.4, receded from this position but the latest HEW policy supersedes the 1965 statement which includes § 181.4, *supra*. See HEW March and December 1966 Statements—not reported in CFR.

The HEW Statements of Policies for School Desegregation are referred to generally in the school desegregation world as guidelines. At least three such statements have been issued, one in 1965, one in March 1966, and another in December 1966. There apparently have been amendments. Footnote 2, *supra*. No guidelines whatever were in issue in the lower courts.[3] The guidelines of March 1966 had not been promulgated when the cases were there. Indeed the guidelines of December 1966 had not been promulgated when the cases were submitted after argument to the original panel of this court. The fact that they had not been in issue did not deter the court in the original opinion. There it was held that the ". . . HEW guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights Act of 1964." This perhaps meant all guidelines promulgated up to the date of the opinion, December 29, 1966. Any doubt as to the inclusion of the December 1966 guidelines was resolved when the majority in the en banc per curiam opinion stated that the 1965 and 1966 HEW guidelines are within the decisions of this court and comply with the letter and spirit of the Civil Rights Act of 1964 and meet the requirements of the United States Constitution. This is adjudication

3. The practice of hearing appeals in school cases on old records is very unsatisfactory. We do not know what changes in desegregation plans may have been made in the interim. It is a rapidly changing public area where plans as well as the law are influx. Cf. *Calhoun* v. *Latimer*, 1964, 377 U.S. 263, 84 S.Ct. 1235, 12 L.Ed.2d 288, where the court took note of a supervening plan and remanded for an evidentiary hearing in the District Court.

without any semblance of due process of law. It is an unprecedented procedure and a shocking departure from even rudimentary due process.[4] Approval of future guidelines is limited by the majority to those ". . . within lawful limits."

The theory of the court escape route and the necessity to hold all guidelines valid is apparently developed in the interest of supporting the national policy, as expressed in the Civil Rights Act of 1964, of eliminating discrimination in public education. The general theme of the majority is that HEW has the carrot in the form of federal funds but no stick. A stick is needed in those situations where a school board may not take federal funds. The aim is to make a stick out of the federal courts. The courts should cooperate with HEW but they cannot be made to play the part of any stick that HEW may formulate and this is the tenor of the original opinion. Courts are restricted to acting within the limits of the Fourteenth Amendment in the school desegregation area. It may or may not be proper for a court to act within the limits of what the HEW policy may be in allocating federal school funds. Sometimes there may be a difference. A decent respect for the judiciary dictates that we make this plain.

THE STANDARD REQUIRED BY THE MAJORITY IS UNCONSTITUTIONALLY VAGUE

The original opinion states in two places that the only satisfactory plan for desegregating a school system is one that works. One looks in vain for a definition of "one that works". This is manifestly a vague standard. It cannot be

4. Section 602 of Title IV of the Civil Rights Act of 1964, 42 USCA, § 2000d-1 provides that no rule, regulation or order of HEW shall become effective unless and until approved by the President. Whether the guidelines are such rules or regulations cannot be decided without an evidentiary hearing concerning their meaning through application. This question has never been put in issue in these cases.

followed. Moreover, it is subject to selective enforcement and a statute couched in such language would be patently unconstitutional.

In another place in the original opinion the statement is made that substantial integration must be achieved in disestablishing dual school systems. This is not clear. What is substantial? Is the reference simply to a system, or to each school, or to each class room?

The en banc per curiam opinion may have attempted to improve the standard by saying that the criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing the objective of educational opportunities on equal terms to all. Who knows the meaning of this? There is no mention of result.

These vague standards are perhaps the most mischievous parts of the majority opinions. They place unfettered discretion in HEW in the area of school desegregation. No school board will ever know when it has performed its duty to eliminate the dual school system. No school board will ever know whether federal funds will be made available. This type of standard places school systems under men and not laws. School boards and school patrons are entitled to a clear and definite standard. The problem of desegregation will not be solved absent a clear standard.

THE DE JURE-DE FACTO DOCTRINE IS UNFAIR

The unfairness which inheres in the majority opinion stems from the new doctrine which the original panel fashioned under the concept of classifying segregation into two types: de jure segregation, called apartheid, for the seventeen southern and border states formerly having legal segregation; and de facto segregation for the other states of the nation. This distinction, which must be without a dif-

ference and somewhat hollow to a deprived child wherever located, is used as a beginning. The original opinion then goes on to require affirmative action on the part of the school authorities in the de jure systems to integrate the schools. The neighborhood school systems of the nation with their de facto segregation are excused. The Constitution does not reach them.[5]

This reasoning is necessary to reach the end of compulsory integration in the so-called de jure states. It is the counterpart to overruling the settled construction of the Fourteenth Amendment, to be next discussed, that integration is not commanded. The restrictions in the Civil Rights Act of 1964 against requiring school racial balances by assignment and transportation are written out of the law with respect to the de jure states by using the de jure-de facto theory. Title IV, §§ 401(b), 407(a), 42 USCA, §§ 2000c(b), 2000c-6. The overruling of the constitutional limitation removes the other impediment to compulsory integration. The way is thus cleared for the new dimension. The only question left is when, and to what extent. The authority to HEW is carte blanche. We should disavow the de jure-de facto doctrine as being itself violative of the equal protection clause. It treats school systems differently. It treats children differently. It is reverse apartheid. It poses the question whether legally compelled integration is to be substituted for legally compelled segregation. It is unthinkable that our Constitution does not contemplate a middle ground—no compulsion one way or the other.

The de jure-de facto doctrine simply is without basis. Segregation by law was legal until the *Brown* decision in 1954. Such segregation should hardly give rise to puni-

5. The legislative history of the Civil Rights Act of 1964 does not show that Congress acted on a de jure-de facto basis. I would not attribute such a form of sectionalism to the Congress.

tive treatment of those states employing what was then a legal system. The Supreme Court has never so indicated. Moreover, the Supreme Court holding in *Brown* was based on the finding that segregated education was unequal. How can it be unequal in one section of the country and not another? Does *Brown* interdict only segregation imposed affirmatively by law, or does its rationale also include the state action of holding to neighborhood assignments thereby perpetuating de facto segregation? The majority decision limits the rationale to the southern and border states type of segregation formerly imposed affirmatively by law. In such event compelled integration may be required in the de jure states but the logic of reaching this point, because of the restrictions in the 1964 Act to the contrary, excuses the de facto states from the Act and the Constitution.

The real answer is that no such new doctrine or theory is necessary. The schools of the South and border states must do what the Supreme Court has ordered—convert dual school systems into unitary nondiscriminatory school systems. The constitutional power already exists in the courts to see that this is done. This newly discovered source of power tends only to disturb settled doctrine. Its purpose can only be to require racial balances in the de jure states.

THE BRIGGS DICTUM

It is a settled constitutional principle that the Fourteenth Amendment does not require compulsory integration but only proscribes segregation. It is the state action segregation which violates the equal protection clause. We have so stated in the following cases: *Avery* v. *Wichita, Falls Independent School District*, 1956, 241 F.2d 230; *Borders* v. *Rippy*, 1957, 247 F.2d 268; *Rippy* v. *Borders*, 1957, 257 F.2d 73; *Cohen* v. *Public Housing Administration*, 1958, 257 F.2d 73; *City of Montgomery* v. *Gilmore*, 1960, 277 F.2d 364; *Boson* v. *Rippy*, 1960, 285 F.2d 43; *Stell* v. *Savanah-*

Chatham County Board of Education, 1964, 333 F.2d 55; *Evers* v. *Jackson*, 1964, 328 F.2d 408; *Lockett* v. *Board of Education of Muscogee County*, 1965, 342 F.2d 225.

This principle is euphoneously referred to in the original two-judge opinion as the *Briggs* dictum. It was stated in *Briggs* v. *Elliott*, E.D.S.C., 1955, 132 F. Supp. 776, but no court, until now, has ever held the Fourteenth Amendment to mean otherwise. The Amendment is entirely negative in character. The original panel, as a part of its two-pronged approach to compulsory integration, overruled this principle *sub silentio*.

The court, sitting en banc, could overrule this settled principle and the majority has now done so to an unknown extent in paragraph 3 of the per curiam opinion. We will not know the extent until the question of racial percentages is squarely presented. Here, as I understand the per curiam opinion, the question is tangential except as it relates to converting to a unitary school system. In the first sentence of paragraph 3 the majority holds that school boards have the affirmative duty under the Fourteenth Amendment to bring about a unitary school system in which there are no Negro or white schools—just schools. We can all agree on this statement. The opinion does away with any distinction between the terms "integration" and "segregation" in the field of school desegregation law insofar as the distinction interferes with the affirmative duty to bring about unitary school systems. We can all agree on this. It is then said that in fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all white schools but that such opportunity must be coupled with the integration of faculty, facilities, and activities. Then without more, the decisions of this court setting out this principle are overruled to the extent that they conflict with the view

of the majority. I am left in doubt as to whether this is a retrenchment from the panel decision. Time will tell.

It may be added that if the court is overruling this settled constitutional principle, it brings this circuit into conflict with the First, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits. *Springfield* v. *Barksdale*, 1 Cir., 1965, 348 F.2d 261; *Bradley* v. *School Board of Richmond, Virginia*, 4 Cir., 1965, 345 F.2d 310; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 4 Cir., 1966, 369 F.2d 29; *Deal* v. *Cincinnati Board of Education*, 6 Cir., 1966, 369 F.2d 55; *Bell* v. *School, City of Gary, Indiana*, 7 Cir., 1963, 324 F.2d 209, cert. den., 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; *Clark* v. *Board of Education of Little Rock*, 8 Cir., 1966, 366 F.2d 661; and *Downs* v. *Board of Education of Kansas City*, 10 Cir., 1964, 336 F.2d 988, cert. den., 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800. The case of *Taylor* v. *Board of Education of New Rochelle*, 2 Cir., 1961, 294 F.2d 35 is not to the contrary. There the remedy fashioned was freedom of choice imposed on neighborhood assignments. The case of *Board of Education of Oklahoma City* v. *Dowell*, 10 Cir., 1967, ... F.2d . . . ., [slip opinion dated January 23, 1967], does not appear to be to the contrary. The court distinguished *Downs* by pointing out that *Dowell* involved a finding of bad faith on the part of the school board in carrying out the original order of the District Court to disestablish the dual school system.

It is hard to know just what the court has held as between the panel decision and the en banc per curiam decision. The labored effort to establish the de jure-de facto concept and to overrule this constitutional principle hardly seems calculated as an exercise in semantics. It is more in the nature of judicial lagniappe for use on another day. We will know the full import of the opinions when a motion is presented to assign children on the basis of race so as to comply with what each particular movant may deem

to be, in his view, a desirable racial composition for the particular school or schools. This leaves the law in a very unsatisfactory state and portends of utter confusion for school boards.[6]

THE DECREE

The use of a uniform decree, as the majority points out, is not novel. Our school desegregation decisions have tended toward uniformity in the freedom of choice method of assignment and in the administration of such plans. A uniform decree within the limits of minimum standards would aid school boards and the district courts but the uniform decree entered in this case can be faulted because of its detail. This comes about through the unbounded aim of the court to track the HEW guidelines. It must be remembered that decrees may have to be enforced by the court and a court should guard against being put in the unfeasible position of having to hear motions based on the

6. A good example of the problems to be encountered in eliminating the dual school system is to be seen in the Taliaferro County, Georgia school system. See *Turner v. Goolsby*, S.D. Ga., 1965, 255 F.Supp. 724, for background. There were only two schools in the system and the board desegregated, effective in September 1966, on the basis of converting the white school into an elementary school and the Negro school into a high school. A perfect racial balance would be accomplished under the plan. In 1965 there were approximately 600 Negro children and 200 white children enrolled in the system. The records of the Georgia State Department of Education as of January 19, 1967 indicate that there are now 527 Negro students enrolled in the Taliaferro County school system and no white students. This result raises serious questions. How is a "plan that works" to be formulated for this school system? What number of white students will be needed to make it work? Where will they come from? How will they be selected? Will a lottery system be used? Will they be compelled to attend the Taliaferro County school system? If so, how? Will the taxpayers of the system be compelled to pay for educating children brought in from outside the system? Will the court ignore system lines although the laws of Georgia provide for separate school systems? What measures will be employed to avoid resegregation through families removing their residences from the school system? Granted this is an extreme example but it is nevertheless a factual situation.

alleged breach of some minor and insubstantial provision of its decree. It is also not clear to me that sufficient latitude is left to the district courts to adjust such practical difficulties as may arise under the detail of the decree.

HEW has an advantage over the district courts, as the court has now restricted them, in the execution of school desegregation plans. HEW may delay, excuse, and change. HEW may vary its requirements as between systems. The majority has left no such power in the district courts. They are admonished to follow HEW but it is a sad day for the district courts, and for the entire judiciary as well as for the principle of separation of powers when the only discretion left them is within the limits to be set by HEW.

It also would appear improper to constitute the courts as overlords of the school systems of this circuit to the extent done in the uniform decree. The district courts must require school equalization to the extent set out in paragraph VI of the decree. Its scope is only a short step from taking over curriculum. The building improvement provision moves the courts in the direction of levying local taxes. Ordering school boards to discontinue the use of buildings could amount to taking property without due process and just compensation. These are drastic measures and there are no facts before the court to demonstrate the necessity for them. It is entirely proper for the District Court to disapprove new construction where it will perpetuate the dual school system but this is a matter for complaint and hearing rather than for advance supervision as is required under § VII of the decree.

By way of summation, I reiterate that the majority opinions are unfair to the extent that they discover or establish and then rely upon the de jure-de facto divisive sectional theory. The opinions expand, without constitutional authority, the requirement that dual school systems

be converted into something more than unitary school systems: to-wit, that substantial integration be achieved in the respective school systems. This added requirement is itself impermissibly vague as a standard without further delineation. The opinions unduly restrict personal liberty to the extent that compelled integration is approved or required, and in this regard improperly overturn and expand the settled meaning of the Fourteenth Amendment. The court errs in prematurely holding that the guidelines issued by HEW are constitutional and within the scope of the Civil Rights Act of 1964. No guidelines whatever were considered by the district courts. Some of those approved had not been written.

My own view is that the law makes no such requirement as the majority of the court imposes. No such radical departure is necessary to accomplish what the Supreme Court has directed the lower courts to accomplish—the elimination of the dual school system. The Supreme Court has not said that every school must have children from each race in its student body, or that every school room must contain children from each race, or that there must be a racial balance or a near racial balance, or that there be assignments of children based on race to accomplish a result of substantial integration. The Constitution does not require such. We would do well to "stick to our last" so as to carry out the Supreme Court's present direction. It is no time for new notions of what a free society embraces. Integration is not an end in itself; a fair chance to attain personal dignity through equal educational opportunity is the goal. My view, however, is now lost in this court; hence this DISSENT.

COLEMAN, Circuit Judge. SEPARATE OPINION.

These cases remind me of what Mr. Chief Justice Chase said in *Texas* v. *White*:[1]

> "We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone."

This Court, exercising only such appellate jurisdiction as Congress has seen fit to confer upon it, confronted solely by a question of how best to preserve an already settled Constitutional right, should be guided *by the Constitution alone and by nothing else.*

No one denies that to an incalculable degree the future of this Country depends inescapably upon the continued, constantly improved education of *all its inhabitants.* Nor can it very successfully be denied that the best practical hope of attaining this objective is to be found and maintained in the public schools. It became plain over a hundred years ago that private schools did not and could not reach the masses of the people.

Compulsory discrimination in the public schools, founded on race or color, is Constitutionally dead. No Judge would dispute this. Existentially it is like the wounded animal which bounds on for awhile after it has been fatally shot. The critical problem now is that we must not wreak irreparable injury upon public schools while executing the sentence of death against compulsory segregation. Thoroughly realizing this, the Supreme Court

1. 74 U.S. 700, 720; 7 Wall 700; 19 L. Ed. 227 (1868).

left the details of the eradication to the sound judicial discretion of the District Courts, subject only to appellate review. To this day this assignment has not been changed. I do not suppose in our form of government that it could be changed. Courts alone make binding adjudications on questions of Constitutionality, and litigation must begin at the District level.

The public schools of the Nation, not just those of a particular section, are now caught up at the second battleground, legal and political, not about the death of unlawful discrimination but about who and how many of any particular race shall go to any particular school with how many members of some other race. If one looked only at the great volume of litigation and its accompanying strife and publicity he would jump to the conclusion that nothing matters but the racial composition of any educational facility. This is pursued regardless of the real preferences, exercised, in genuine freedom, of those directly involved, that is, those who must have an education. In the ultimate this could become a great tragedy for those most affected. An educational house divided against itself may have trouble standing. It certainly cannot operate with maximum effectiveness.

In the light of these considerations, as one who was able to secure an education solely because there was a public school in which there was an opportunity to obtain it, I shall now express my views, as one Judge of this Court, individually, as to the decision now about to be rendered.

In doing so, I proceed upon the thesis that there is nothing at all inconsistent about being, at the same time, both a loyal American and a Southerner. I think Andrew Jackson conclusively settled that point over a century ago.

It is particularly unfortunate if our decision in these cases is, in any way to be grounded on old scores against

the States of this Circuit. This is contrary to American legal tradition; it opens old wounds, rekindles old fires, and lends itself as a weapon to the futile cause of further intransigency. Prior to 1954, racially separate, if equal, schools had not been condemned as unconstitutional. One is not to be punished or harassed for an act which was lawful when it was done. Indeed, such condemnation in this instance would inferentially include some of the most highly respected Judges who ever graced the Supreme Court. They had opportunities to condemn the system but, in the exercise of perfect judicial integrity, did not. As I understand it, an Omnipotent God does not change yesterday when it is past and gone. Certainly this Court cannot do it. We are now concerned with rectifying the errors of the present and forestalling, if we can, the anticipated errors of the future. I decline to participate in any ex post facto condemnations. I prefer to believe that this Court is not deliberately doing so.

I further believe that whatever the Fourteenth Amendment requires of any State it requires of all States. If we are requiring something here in the enforcement of Fourteenth Amendment rights that should not be required of all fifty States then we have exceeded our authority and we have misapplied the Constitution. I agree with the action of the majority opinion in disclaiming any intention of passing on the validity of educational operations in other Circuits. That matter is not and cannot be before us.

It is out of regard for the desirability of Constitutional uniformity that I agree, in principle, with the attempt to formulate a decree for the future guidance of District Courts in this Circuit. It is obvious that such a decree cannot adjudicate cases in advance of a hearing in the District Court, nor can it be applied in the absence of factual justification.

The decree speaks for itself, of course, but I interpret it to deal at this point with making freedom of choice a reality instead of a promise. I do not understand that this Court has abandoned freedom of choice, if that choice is real instead of illusory.

Nor do I understand it to direct that there shall be a specified percentage of the various races in any particular public school or that there shall be proportional representation of the races brought about by arbitrary order. I agree with Judges Gewin and Bell that the opinion strongly portends such a possibility. But paragraph 5 of the en banc opinion certainly disclaims any such intention. The District Courts are left free to consider all the evidence, including racial attendance percentages, in determining whether the children of any particular school district have been offered a reality instead of a shadow. It is to be anticipated that the bridge will later have to be crossed when we come face to face with a situation wherein there can be no doubt of the freedom but the results are displeasing and are attacked solely for that reason.

I think it all boils down to this. We once had the doctrine of separate but equal. We did not, I am sorry to say, pay much attention to the "equal". We now have freedom of choice. As Judge Bell so splendidly states it, we are now going to have to make certain of the "freedom". To fail in this is to invite other action which at this time I regard as unconstitutional but which could soon be made Constitutional.

The decree is not as I would have written it had I been charged with sole responsibility for the effort. No offense is intended when I doubt that it is perfect. For example, the *en banc* opinion says that "boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an

integrated, unitary school system". Yet II (o) of the decree prohibits any official from influencing parents or students in the exercise of a choice. In other words, if the officials feel that Negro children should be encouraged to apply for admission to a formerly white school they are prohibited from doing so. They are to be condemned, on appearances, if no Negro child chooses to attend a formerly white school; they are not allowed, in the exercise of ordinary freedom of speech, to discuss the matter with Negro children with a view to their exercising a preference in favor of attending a school they have not formerly attended. The school official cannot win. In one breath he is told to act; in the next he is immobilized.

Experience will hone away these inconsistencies and impossibilities. This Court has drafted uniform decrees on prior occasions. These are now speedily outmoded, if not abandoned. Judges, like other human beings, do not always write in granite; they often find that they have only marked in the sand.

Since the HEW guidelines were not the subject of a hearing in the Courts below I do not discuss them here. In my view, they are not now before this Court.

The focal point of the whole matter is the action of the *en banc* opinion repudiating *Briggs* v. *Elliott* and overruling our prior opinions which followed the same rationale, see Footnotes 1 and 2 for the citations.

It is my view that these prior cases were correctly decided. Other Circuit Courts in this Country appear to feel likewise. If the reasoning in these over-ruled cases is incorrect then we simply face the following:

The freedom of the Negro child to attend any public school without regard to his race or color, first secured in the *Brown* cases, is again lost to him after a short life

of less than thirteen years. He is left open to a future adjudication that although he does not wish to attend School A and has in fact expressed a desire to go elsewhere this is of no importance. Because of his race he can be assigned to a particular school to achieve a result satisfactory to someone who probably does not even live in the district but who wishes to make a racial point. Thus the child re-enters the same racial discrimination from which he escaped so short a time ago. He remains bogged in race. Moreover, when Negro children are to be selected by someone, we know not who, to comply with such a racial assignment, on what basis will the selection be made? How will the wishes of some be respected and others rejected, solely because they happen to be of the Negro race? We are not freeing these children of racial chains. We are compounding and prolonging the difficulty.

The true answer remains, give him absolute freedom of choice and see to it that he gets that choice in absolute good faith.

In conclusion, I wish to say that in my own case a burning desire to obtain an education in the face of impossible circumstances is not a theoretical experience encountered only by others. I did not have an opportunity to attend school until I was eight years of age. The delay was quite unavoidable; there simply was no school to attend at that particular time. My mother taught me how to read and write, to add and subtract. My total sympathies are with the cause of education freely available to all. This, of course, under the Constitution requires no special privileges for any group or segment of the population. I regret that where once the concern was for schools to attend we now have so much strife about the details of utilizing those so readily available.

What I have said herein is with the greatest deference for my Brethren who think otherwise. We must and shall continue to work together according to our individual judgments of the law. The en banc decision may portend more problems ahead than we have heretofore encountered.

I concur in the reversal of the Judgments below, but my views of the issues generally are as herein set forth.

GODBOLD, Circuit Judge, dissenting:

I respectfully dissent. I wish not to delay appellate procedures if any of the parties desire to pursue them. Therefore, I am recording my dissent at this time and will file a dissenting opinion at a later date.

GODBOLD, Circuit Judge, DISSENTING:

I recognize and oppose the inequities of state-enforced and state-encouraged racial discrimination in the operation of public schools. I respect the energy, labor and intellect that judges of this and other courts have given in the past twelve years toward solution of such inequities. I understand, and share, the desire to chart a future course having fewer difficulties and frustrations. Nevertheless, although the decrees appealed from must be reversed, I dissent from the opinion and the decree.

Because this dissent is late-filed and numerous points have been discussed in the other dissenting opinions, I shall limit this opinion to only a few of the grounds on which the majority opinions, in my view, are both incorrect constitutionally and inappropriate as a matter of judicial administration.

I

In the critical area of student assignment the majority propose an unconstitutional condition on the opera-

tion of a valid freedom of choice system, violative of equal protection and of due process. This court has deemed freedom of choice[1] an acceptable method for a school board to use in fulfilling its duties. *Singleton II*, 355 F.2d at 871. HEW recognizes it as a permissible means of desegregation. 1966 Revised Guidelines, Subpart B, 181.11; also Subpart D. A substantial part of the majority opinions and the attached decree are directed at setting out requirements of a free choice plan that is truly free and unfettered. But the majority superimpose upon free choice, even though in all respects fairly and validly set up and administered, a condition subsequent that the statistical results of racial mixing[2] produced by the freely-made choices must be acceptable under standards imposed from outside those making the choice. They do this by establishing as a constitutional requisite that a free choice system must produce a degree of student racial mixing, not yet defined as to limits but nevertheless required.

The United States reads the language of the majority in this vital area as mere dictum. In brief on rehearing the government says: "The appellees, in petitioning for rehearing, asserted that the decision of the panel held that the Constitution imposes an absolute duty to achieve a racial mixing of students so as to eliminate a disproportionate concentration of Negroes in certain schools within a system. Once this proposition is asserted, the appellees have no difficulty in disparaging the opinion as being inconsistent with prior holdings of the Fifth Circuit.

1. Throughout this opinion "freedom of choice" and "free choice" refer to a plan validly set up, properly administered, and with choices freely exercised without external pressures, so that the plan itself (as opposed to the statistical results produced by exercised choices) is in all respects constitutionally acceptable.

2. The term "racial mixing" is used with intent that it be neither laudatory nor denigrating of the process and the individuals involved, but as a simple descriptive phrase that avoids further confusing use of "integration" and "desegregation."

It is true that the panel indicated its concern that educational opportunities on an equal basis be furnished to all, and the opinion does suggest in a footnote that elimination of the all-Negro school makes this objective easier to obtain. *But the appellees misread the opinion when they claim that this is the holding of the Court.*" I wish that I could read the majority as saying no more than that disproportionate racial concentration of students is evidentiary of whether a freedom of choice system is truly free, or share with confidence the view that the teeth of the original opinion are extracted by paragraph 5 of the en banc opinion. I am not able to do so. If the language of mandatory mixing is indeed a mere aside we shall all await with interest to see whether the courts are the prisoners of their own slogans and the dictum of today is to be asserted as the law of tomorrow.

The majority define "integration" and "desegregation" as conversion of a de jure segregated dual school system to a unitary, nonracial (nondiscriminatory) system—students, faculty, staff, facilities, programs, and activities, this for the objective of offering equal educational opportunities for all.[3] There are two strings to the bow of this definition. To convert a dual system into a unitary, non-racial system the student body is one of the arms of the system which must be converted. Second, the equal educational opportunity that must be offered is elsewhere in the opinion equated with a racially mixed education.

The majority state firmly that the law does not require racial balance, or a "maximum of racial mixing", nor that each and every child shall attend a racially-balanced school,[4] and that Guidelines are not to be used to establish

3. Footnote 5.

4. Footnote 5.

racial "quotas." Percentage figures in the Guidelines may be rules of thumb as the majority say. It may develop that neither the courts nor the Commissioner of Education will seek to achieve racial balance by the Guidelines or otherwise. But all this is irrelevant to the constitutional issue. Grasping the irrelevancy requires understanding that "racial balance" is a word of art referring to a ratio of Negro and white students in approximately the same proportions as Negro and white population of the community or of the schools. It is proposed that governmental action must produce a degree of racial mixing less than "racial balance" but, by someone's standards, sufficiently mixed to produce "equal educational opportunity," even though free choices by students and their parents have produced a contrary or lesser result.[5] Despite disclaimers of specific figures and of racial balance, power to require

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5. For example:

p. ____: "As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance. Has the operation of the promised plan actually eliminated segregated and token-desegrated schools and achieved substantial integration?"

p. ____: "If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park. Freedom of choice is not a key that opens all doors to equal educational opportunities."

En Banc Opinion p. ____: "In fulfilling this [affirmative] duty it is not enough for school authorities to offer Negro children the opportunity to attend previously all-white schools. The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties, facilities and activities, as well as students."

Other language is somewhat less mandatory in terms, as statements that mixing of students is a high priority goal and that disproportionate concentrations of Negroes cannot be ignored. But when the opinion is carefully read racial mixing is not set out as a desirable objective but as a constitutionally required result.

mixing is reserved within a range, a hazy range to be sure but nevertheless existent.[6] If the Commissioner and the courts constitutionally have no power to require racial mixing superimposed on a valid free choice system, constitutionality is not conferred by the premise that they will not employ the power to the extent of "racial balance" but are free to roam at will in requiring mixing to a lesser extent.[7]

The theory that under a free choice plan statistical imbalance alone rises to constitutional dimensions was discarded by the Eighth Circuit in *Clark* v. *Board of Education of Little Rock*, 369 F.2d 661, 666 (8th Cir., 1966).[8] See

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6. Perhaps the range is "substantial integration" as used by the Civil Rights Commission. See n. 5 of majority opinion.

7. Significant testimony from HEW officials was given in *Alabama NAACP State Conference of Branches et al. and United States of America v. Lurleen Burns Wallace, Governor, and John W. Gardner, as Secretary of Health, Education and Welfare of the United States, and Harold Howe II as United States Commissioner of Education*, Case No. 2457-N, decided by a three-judge court on May 3, 1967 (Middle District of Alabama).

As I read that testimony HEW considers it unlikely that a fairly operated free choice plan will fail to produce transfers in numbers that it deems sufficient. But that under §181.54 of the 1966 Guidelines the best indicator of whether the plan is working is the extent of transfers from segregated schools. That a low rate of, or lack of, transfers may lead to an administrative examination of operation of the plan, which might result in a determination that the plan is not being properly operated. That §181.11 authorizes the Commissioner to determine the conditions under which a free choice plan is not acceptable.

There is other HEW testimony that if a school system employed a free choice plan, administered in a non-discriminatory manner in every respect, and no Negro chose transfer to a white school and no white student chose transfer to a Negro school, there would be a "technical violation" of the 1966 Guidelines and the system regarded as not in compliance. (Whether this is likely to occur is not the question. We are concerned with the scope of power, not the withholding of exercise of it.)

8. "Though the Board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of

also *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55, 62 (6th Cir. 1966):

> "[T]he mere fact of imbalance alone is not a deprivation of equality in the absence of discrimination.
>
> * * *
>
> "[B]are statistical imbalance alone is not forbidden.
>
> * * *
>
> "Appellants' right to relief depends on a showing of more than mere statistical imbalance in the Cincinnati schools."

That school desegregation cases are class actions does not add any validity to the idea of a required mixing result.[9] It may be that "[T]he right of the individual

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race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their class rooms. We find no unlawful discrimination in the giving of students a free choice of schools. The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself."

* * *

"In short, the Constitution does not require a school system to force a mixing of the races in school according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional."

9. I do not comment in detail on the majority's proposition that cases having to do with procedures for enforcement of rights and the exhaustion of administrative remedies are now to be treated as substantively creating class rights to constitutional entitlements previously considered to be valued rights of individuals. Instead I deal primarily with the additional question of whether the alleged class right can override or swallow up individual right to equal protection. "It is the individual who is entitled to the equal protection of the laws." *McCabe v. Atchison, etc.*, 235 U.S. 151, 161, 35 S.Ct. 69, 59 L.Ed. 169 (1914).

plaintiffs must yield to the right of Negroes as a class."[10] But the majority do not stop there. They create the rule that the freely-exercised choice of *all* individual members of the class must yield to the "right" of the class if exercise of choice has not produced a result agreeable to the standard of a supervising authority (judicial or administrative). But "[t]here is nothing in the Constitution which prevents his [everyone's] voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous." *Bradley* v. *School Board of City of Richmond*, 345 F.2d 310, 316 (4th Cir., 1965). See also, *Olson* v. *Board of Education*, 250 F.Supp. 1000, 1006 (E.D. N.Y.), appeal dismissed as moot, 367 F.2d 565 (2d Cir., 1966): "[N]or did it [*Brown*] decide that there must be coerced integration of the races in order to accomplish educational equality for this also would require an appraisal of the effect upon the hearts and minds of those who were so coerced."

It is asserted that freedom of choice is a privilege or means not itself reaching constitutional dimensions, as though this is an answer to whether once conferred the exercise of it may be aside. The concern is not merely whether individual privilege must give way to an overriding constitutional right, but whether individual privilege conferred upon the beneficiaries of the right as an acceptable means of meeting the constitutional requirement, and validly exercised, must give way. Exercised free choice

10. The class is defined as all Negroes in a school district attending an inherently unequal school. If equal educational opportunity includes the right to a racially-mixed education with mandatory mixing if not otherwise attained, it is not clear why the class stops at district lines. Stopping at the line is a convenient device for administration and for procedural purposes in litigation but wholly irrelevant to the quantum of constitutional entitlements.

is a benefit, and student and parents may not be deprived of that benefit on racial grounds.

Once exercised the choice is one of associates. The constitutional depths of freedom to select associates are not yet fully explored.[11] "No one can doubt that freedom of association, as a basic mechanism of the democratic process, must receive constitutional protection, and that limitations on such a fundamental freedom must be brought within the scope of constitutional safeguards." Emerson, Freedom of Association and Freedom of Expression, 74 *Yale L.J.* 1 (1964). Professor Emerson points out that associational rights are not derived solely from the first amendment but are implied in the whole constitutional framework for the protection of individual liberty in a free society. The right of freedom of association most frequently comes up in the context of the power of government to regulate the affairs of a group or association, *NAACP ex rel Alabama* v. *Patterson*, 357 U.S. 449, ... S.Ct. ..., ... L.Ed. .... (1958), but arises also in other contexts, including the area where the associational rights are not organizational but personal in nature. It is this context which *Wechsler, supra,* believed was the primary, but overlooked, issue in the early school segregation cases. And Professor Emerson notes, "[I]n this situation—

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11. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Har. L. Rev.* 1, 33 (1959), referred to by the majority: "For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate . . . ."

And at 73 *Har. L. Rev.* 34: "[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimensions . . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?"

an official proscription of personal association—the right to associate in its literal meaning comes nearest to being an absolute right untouchable by government power."

The collision is head-on between individual freedom and paternalistic authoritarianism. No more invidious discrimination, or improper government objective, can be imagined than national power setting aside the valid exercise of choice by members of a class in the name of the constitutional objective for which the choice was granted to the class in the first place.

The cut horizontally and vertically into American life of what the majority postulate is breathtaking. There are many means by which the Negro is moving out of established patterns of segregation and entering the full current of American life. To meet the constitutional objective of juries not racially discriminatory acceptable machinery must be established to place on the jury rolls Negroes qualified for jury service. *Brooks* v. *Beto*, 366 F.2d 1 (5th Cir., 1966). In the name of the standard are Negroes (and whites too) constitutionally forbidden to exercise excuses or avail themselves of other means valid and acceptable to them of avoiding actual service?[11a] Whether Negroes are entitled to move, and wish to move, from the back of the bus is one thing; whether the power of the state is to be employed to require them to move is another. We need not speculate on the mathematical probabilities of what the exercise of choices may produce in any of these areas of life (though there is implicit in the majority position the feeling that under a valid free choice system not enough

11a. In a criminal case against a Negro defendant the exercise by the white prosecutor of peremptory challenges so as to strike Negro jurors is not in a particular case a violation of equal protection. *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d (1965). If the Negro defendant, by like exercise, removes Negro jurors is his action subject to scrutiny?

Negroes will make the choice to produce the defined goal of equal educational opportunity.) The constitutional problem is not founded in probability but power and duty of governmental authority to act regardless of probability.[12]

II

Expressions by this court of the validity and constitutionality of the 1966 Guidelines were wholly inappropriate. Because of the context and manner of that action no one can say with assurance or exactness what has been decided, what is open, and what is subject to re-examination.

Each of the seven cases before us was pending on the docket of this Court before the 1966 Guidelines were promulgated. These Guidelines were not involved in any manner in the cases when litigated in the district courts, and the parties had no opportunity to raise by normal judicial procedures and methods questions of their constitutionality and their consistency with the 1964 Act, to draw the issues and develop evidence thereon.

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12. Nor would the basic constitutional defect be remedied by an approach along the following line: that choice is exercised annually, and if required standards of mixing are not attained in one year the free choice plan itself might be declared unacceptable for the next year. To deprive of free choice because, on the basis of prior choices, it is feared that a required level of mixing will not be attained in the next year is no less invidious than retrospectively vitiating exercise of choice that did not produce the demanded ratio.

Let it be emphasized that here as elsewhere, the words "ratio" and "required racial mixture" and words of like import do not necessarily represent a figure exact in a mathematical sense, but the range—whatever it may be—less than the "racial balance" which the majority and HEW say they will not attempt to reach but insufficient to qualify as "equal educational opportunity." It requires no special gift of prophecy to foresee that the range will center on the suggested percentages of the Guidelines.

The Guidelines were brought into these cases for a limited purpose. The Court asked counsel to comment by supplemental briefs on the extent to which it is permissible and desirable for the courts to give weight to guidelines, and if permissible and desirable to suggest means to make them judicially effective (Opinion, Footnote 13). From this proper inquiry for comment of counsel on matters of judicial power and policy the majority have vaulted to premature pronouncements of compliance with statutory policy and to unprecedented and almost offhand statements on complex constitutional questions of vital significance to millions of our citizens.

It is a non sequitur that a court is empowered to act on a constitutional question not before it for decision on the ground it feels it should, for no court would ever do so without such feeling. The doctrine of constitutional restraint is not to restrain courts that do not want to act but those that do and to protect them from the very forces and circumstances that engender a sense of urgency, create a compulsion to act and serve to rationalize action after the event.

For reasons whose soundness is beyond argument the doctrine of restraint in passing on constitutional issues is engrained in our jurisprudence. "Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication . . . . only by such self-restraint will we avoid the mischief which has followed occasional departures from the principles which we have followed." *United States* v. *Rumely*, 345 U.S. 41, 48, 73 S.Ct. 543, 97 L.Ed. 770, 776-77 (1953).[13] This circuit consistently has recognized and

13. "[O]nly an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *United States v. Auto Workers*, 352 U.S. 567, 591, ___ S.Ct. ___, ___ L.Ed. ___ (1957).

honored the principle. See e.g., *Gibbs* v. *Blackwell*, 354 F.2d 469, 471 (5th Cir., 1965); *Conner* v. *New York Times Co.*, 310 F.2d 133, 135 (5th Cir., 1962).

The Court succumbed to the temptation to reach all issues within its sight and thereby present a total package—complete, neat and with all corners square. Already it was well-established that the Guidelines are of great weight and are minimum standards. If they were to be made judicial standards in a more formal sense they could have become so subject to a determination of their constitutionality and statutory authorization at a proper time and under appropriate judicial procedures.[14] The millions affected by them are entitled to no less, nor are the public officials who must administer them, the school officials who must seek to implement them, the citizens who are assisted by them, and the courts who are to give weight to them.

The position of the United States itself exemplified that validity and constitutionality of the Guidelines were never in issue. At p. 56 of its brief for the en banc rehearing the United States said:

> "The appellees' briefs argue at considerable length that the Guidelines violate the Civil Rights Act of 1964. The North Carolina Board of Education, as *amicus curiae*, requests that the Court not consider

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"We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity . . . . Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes, proof." *United States v. Petrillo*, 332 U.S. 1, 5 and 6, ____ S.Ct. ____, ____ L.Ed. ____ (1947).

14. There is no way for a court to properly decide as an abstraction whether the Guidelines are such rules, regulations or orders as do not become effective until approved by the President (as required by §602, Title IV, Civil Rights Act of 1964, 42 U.S.C.A. §2000 d-1). There must be a hearing at which there is evidence on the scope of their application.

the question of the 'validity' of the Guidelines, urging that that question is not here in issue. We agree that that issue is not technically before the Court. But the question of whether the Guidelines are an appropriate guide for effective relief in a Fourteenth Amendment case is before the Court. We believe that they are, and that the Guidelines conform to Fourteenth Amendment standards."

It is especially unfortunate that the en banc court should have discussed validity and constitutionality at a time when there was pending before a three-judge court in the United States District Court for the Middle District of Alabama, *Alabama NAACP State Conference of Branches, et al, and United States of America* v. *Lurleen Burns Wallace as Governor, et al, and John W. Gardner, as Secretary of Health, Education and Welfare of the United States, and Harold Howe II, as United States Commissioner of Education,* Civil Action No. 2457-N, which had been tried, briefed, argued and was under submission awaiting decision.

In that case the constitutionality of the 1966 Guidelines had been squarely raised, a record developed,[15] and the application, effect, operation and validity of the 1966 Guidelines litigated at length, including the difficult question of presidential approval. The United States had waived sovereign immunity to the extent of consenting that Secretary of Health, Education and Welfare Gardner and Commissioner Howe be made parties defendant for the purpose of litigating these important questions. Secretary Gardner and Commissioner Howe appeared and admitted jurisdiction.

The mischief of failure to exercise requisite judicial restraint was exemplified when 2457-N was decided on

15. The parties called 16 witnesses, submitted 40 depositions and filed approximately 800 pages of briefs. A substantial part of all this related to constitutionality of the Guidelines and whether they conformed to the intent of the 1964 Act.

May 3, 1967, for that court considered constitutionality and validity to be already decided by this Court and a decision based on appropriate pleadings, proof and consideration was foreclosed.[16]

In my view the expressions by this Court on both constitutionality and validity were substantively erroneous. But that is immaterial to the matter of how vital questions are properly considered and determined.

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16. "After extensive briefing and full argument, the Court of Appeals for the Fifth Circuit in No. 23,345, *United States v. Jefferson County Board of Education*, decided December 29, 1966, rehearing decided en banc March 29, 1967, has held that the 1966 HEW Guidelines are 'within the scope of the congressional and executive policies embodied in the Civil Rights Act of 1964.' (Slip opinion p. 29.) Again the Court said: '* * * we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964.' (Slip opinion p. 9.) On en banc rehearing, the Court reiterated: 'These Guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and meet the requirements of the United States Constitution.' (Slip opinion p. 7.)

"These holdings were made deliberately and advisedly in the face of contentions that the validity of the 1966 Guidelines was not in issue. The Court ruled otherwise, holding that the courts should rely heavily upon the Guidelines and should model their standards after those promulgated by the executive (original slip opinion p. 18), and that 'these Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation.' (Slip opinion on en banc rehearing p. 7.)"

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants.

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that the following Defendants appeal to the Supreme Court of the United States from the judgment and Decree (including Exhibit A thereto and the Opinion filed therewith, all of which are herein called "the Decree") dated and entered in this cause March 22, 1967, by the three-judge court constituted pursuant to Sections 2281 and 2284, Title 28, United States Code, for the purpose of hearing this cause in the United States District Court for the Middle District of Alabama, Eastern Division, composed of United States Circuit Judge Richard T. Rives, and United States District Judges H. H. Grooms and Frank M. Johnson, Jr., to-wit: Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer of Alabama State Board of Education; James D. Net-

tles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrell, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Ward and Harold C. Martin, as members of Alabama State Board of Education.

This appeal is taken pursuant to 28 United States Code Section 1253.

II. The Clerk will please prepare a transcript of the record of this cause, for transmission to the Clerk of the Supreme Court of the United States and shall include in said transcript the following:

1. The transcript of proceedings had, evidence introduced and actions taken at the trial of this supplemental proceeding on November 30, December 1 and December 2, 1966, including only the exhibits introduced by the parties which are hereinafter listed and specifically described.

2. All pleadings and motions in this cause, other than motions concerning the production of documents and the issuance of subpoenas and subpoenas duces tecum including (but not limited to) the supplemental complaints filed by the Plaintiffs and Intervenors and all responsive pleadings thereto by the Defendants and the Motion to Dismiss filed by the Defendant, Ernest Stone, Secretary and Executive Officer of the Alabama State Board of Education and the affidavit filed therewith and all orders entered upon such pleadings and motions.

3. The Decree of the Court and the Opinion and exhibit attached thereto dated and entered March 22, 1967.

4. The depositions of Harold Howe, II, and Lawrence E. Crowder introduced as Exhibits 47 and 48 in behalf of the Defendants, together with all exhibits to said depositions.

5. All objections filed by the Defendants to all exhibits and depositions offered in evidence by the Plaintiffs and Intervenors and all Orders of the Court thereon.

6. The Defendants' Motion to Dismiss filed and the Order thereon.

7. Defendants' Exhibits 1, 2, 3, 4, 9, 11, 20, 24, 36, 40, 41, 46, Exhibit offered (Tr. dated December 1, p. 26-28) as Exhibit 47 or 47-A, Exhibits 51, 52, 53, 54, 55, 56, 57-A, 57-B, 68 and 72.

III. The following questions are presented by this appeal:

Did the Court err by taking the actions listed below?

1. Granting a permanent mandatory injunction compelling Defendants to act so as to materially and adversely affect (a) the rights of the ninety-nine local school districts of the State of Alabama named in the Decree, and (b) the rights of all trade schools, junior colleges and state colleges as defined in the decree although none of them have been served with process nor were they actually or constructively before the Court—all in violation of the Constitution of the United States and particularly the due process clause of the Fifth Amendment.

2. Granting a mandatory injunction requiring affirmative detailed and continuous administrative actions by state and local officials of Alabama which constitute an intricate process of supervision and administration of the schools, junior colleges and state colleges thereof contrary to the Constitution and Statutes of Alabama and contrary to the Constitution of the United States and particularly the Tenth and Eleventh Amendments thereof, and in violation of the Constitutional separation of gov-

ernmental powers between the United States of America and the States, and also such separation of powers between the judicial, executive and legislative branches of the States and the United States.

3. Entering a Decree which directly conflicts with the Constitution and Statutes of Alabama as judicially construed by the Supreme Court of Alabama in that the Decree compels the State Superintendent of Education through mandatory injunction, to exercise powers not vested in him under the Constitution and laws of Alabama and specifically vested in local boards of education, to-wit:

(a) The placement, assignment and transfer of students.

(b) The transfer or reassignment of teachers.

(c) The closing of public schools.

(d) The control of expenditure of funds in the nature of grants-in-aid to students in the public school system.

(e) The furnishing, direction and control of the transportation of pupils.

(f) The location and construction of school facilities.

4. Holding Title 52, Section 61(8), Code of Alabama (Tuition Grant Statute, No. 687 approved September 1, 1965), unconstitutional and enjoining the Defendants, their agents, employees and successors in office from approving or permitting the approval or payment of any tuition grants or grants-in-aid under the authority of such statute.

5. Entering a Uniform Decree affecting at least ninety-nine of the school districts in the State of Alabama

and requiring each of them to adopt a uniform "plan of desegregation" without any evidentiary hearing by a local United States District Court, thereby denying the local school boards the right to prepare and submit a plan which is proper under local conditions to meet the constitutional requirements, in direct violation of the decisions of the Supreme Court of the United States and the decisions of all of the Courts of Appeal of the United States.

6. Granting a mandatory injunction requiring the adoption of a "plan of desegregation" drawn and calculated to destroy the freedom of choice of all students, arbitrarily and capriciously requiring assignment of all students and teachers in every school and college without any evidentiary hearing contrary to the decisions of the Supreme Court of the United States and of all Courts of Appeals of the United States in many particulars, including the following:

(a) Requiring discriminatory actions by giving preference to students and teachers because of their race in violation of the Fourteenth Amendment.

(b) Requiring a mandatory annual choice by all students in every grade of the schools.

(c) Requiring in the absence of the exercise of a choice that a student "shall be assigned to the school nearest his home where space is available", and that, in assigning students to schools, "no preference shall be given to any student for prior attendance of a school".

(d) Requiring construction of schools and closing of schools for the purpose of desegregation.

(e) Requiring without any evidentiary hearing local expenditures for "physical facilities, equipment, services, courses of instruction and instructional materials" regardless of the ability of either local authorities or state authorities to finance such actions.

7. Entering a Decree contrary to the action of the Congress of the United States under Section 5 of the Fourteenth Amendment providing that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article", such Decree violating the Congressional definition of "discrimination" as applied to the public schools contained in Public Law 88-352 (Civil Rights Act of 1964), particularly Sections 401(b), 407(a), 410, 602, 604, 702 and 702(j) thereof, and Section 604 of the Elementary and Secondary Education Act of 1965 as amended on October 6, 1966.

8. Entering a Decree affecting all school districts, trade schools, junior colleges, state colleges and students thereof, in an action brought by representatives of a class consisting solely of students in the Macon County School District lacking common grounds of fact and law.

9. Permitting the United States of America to intervene in this case, contrary to the requirements of the statutes of the United States.

10. Divesting the United States District Courts of Alabama of their jurisdiction over the schools, trade schools, junior colleges and colleges located within their districts.

11. Granting a mandatory injunction which in effect nullifies and holds void and unconstitutional the Alabama School Placement Law, Act No. 201 of the Legislature of

Alabama, Regular Session 1955, enacted August 3, 1955, as amended.

Respectfully submitted,

/s/ MacDonald Gallion,
Attorney General
State Capitol
/s/ Hugh Maddox
Legal Advisor
Governor's Office
State Capitol
Montgomery, Alabama
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Montgomery, Alabama
Attorneys for Named Defendants

PROOF OF SERVICE

I, MacDonald Gallion, Attorney General of Alabama, and one of the attorneys for Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer of Alabama State Board of Education; James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrell, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Ward and Harold C. Martin, as members of Alabama State Board of Education, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 7th day of April, 1967, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by leaving a copy thereof at the office of Ben Hardeman, Esq.. United States At-

torney for the Middle District of Alabama, at Room 302, Federal Building, Montgomery, Alabama, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C.

2. On the Plaintiffs and Plaintiff-Intervenor and Amicus Curiae, by mailing copies, in a duly addressed envelope, with first class postage prepaid, to the respective attorneys of record as follows:

Ramsey Clark, Esq.
United States Attorney General
Washington, D. C.

St. John Barrett, Esq.
Department of Justice
Civil Rights Division
Washington, D. C.

Brian K. Landsberg, Esq.
Department of Justice
Civil Rights Division
Washington, D. C.

Fred D. Gray, Esq.
34 North Perry Street
Montgomery, Alabama

Melvyn Zarr, Esq.
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

Henry M. Aronson, Esq.
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

/s/ MacDonald Gallion
Attorney General of Alabama
Office of the Attorney General
State Capitol
Montgomery, Alabama

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,
UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants.

Motion for Extension of Time under Rules 13 and 15 of the Rules of the Supreme Court of the United States

This motion is filed to request an extension of time in the filing of the record by the Clerk of the United States District Court for the Middle District of Alabama, Eastern Division, and the Jurisdictional Statement by the appellants under Rule 15 of the Rules of the Supreme Court of the United States in behalf of Lurleen Burns Wallace, Governor of the State of Alabama and President Alabama State School Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer, and James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrill, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Ward and Harold C. Martin, Members, Alabama State Board of Education.

The movants show that John C. Satterfield is the leading counsel in this case; that about five weeks ago it was necessary that Mrs. John C. Satterfield undergo an operation which was of an emergency nature and extremely serious and which was performed at 1:00 A.M., and that she is still confined to her home as a result

thereof; that his mother has, during the period here involved, suffered two massive heart attacks. Hence the said John C. Satterfield as leading counsel in this case has not been able to devote the necessary time to the preparation of a proper Jurisdictional Statement under Rule 15 of the Supreme Court.

That Rule 13 of the Rules of the Supreme Court of the United States, Paragraph (1) provides as follows:

> It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court not more than sixty days after the filing of the notice of appeal. But, for good cause shown, any judge of the court whose decision is being appealed or in which the notice of appeal is filed (or a justice of this court if application has first been made below), may enlarge the time for docketing the case. Where application under this rule is made to a justice of this court, Rule 34 (2) governs timeliness. All other applications hereunder must be presented to the judge in question before the expiration of the original sixty-day period.

That this motion is filed within the period set forth in Rule 34 (2) of the Rules of the Supreme Court of the United States.

That the Clerk of the United States District Court for the Middle District of Alabama, Eastern Division, is prepared to file the record with the Clerk of the Supreme Court of the United States as provided by the Rules of this Court and within the time required by the Rules of the Supreme Court. However, the Rules of the Supreme Court of the United States provide as follows in Rule 13 (2):

> Upon the filing in this court of the record brought up by appeal, counsel for the appellant shall enter his appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 33, forty copies of a printed statement as to jurisdiction, which shall

comply in all respects with Rule 15. The case will then be placed on the appellate docket.

As the appellants and movants desire to make a full, complete and proper presentation of this matter to the Supreme Court of the United States, they move that there be allowed an additional thirty days for the filing of the record and the Jurisdictional Statement as provided in Rules 13 and 15 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

MacDonald Gallion
Attorney General of Alabama
Alabama State Office Building
Montgomery, Alabama
Gordon Madison
Assistant Attorney General of Alabama
State Capitol
Montgomery, Alabama
Nicholas S. Hare
Special Assistant Attorney General
Tyson Building
Montgomery, Alabama
Maury D. Smith
325 Bell Building
Montgomery, Alabama
John C. Satterfield
Masonic Building
Yazoo City, Mississippi
By /s/ John C. Satterfield
Attorneys for Appellants and Movants

GOODWYN, SMITH & BOWMAN
325 Bell Building
Montgomery, Alabama
SATTERFIELD, SHELL, WILLIAMS AND BUFORD
First National Bank Building
Jackson, Mississippi
Of Counsel

STATE OF MISSISSIPPI
COUNTY OF YAZOO

Personally appeared before me the undersigned authority in and for said County and State, John C. Satterfield, one of the attorneys and the leading counsel in the above styled cause, who first being duly sworn states on oath that the matters and things set forth in the above Motion for Extension of Time Under Rules 13 and 15 of the Rules of the Supreme Court of the United States are true as therein stated.

/s/ John C. Satterfield

SWORN TO and subscribed before me on this the 31st day of May, 1967.

/s/ Stella Price
Notary Public

My Commission Expires: 6/7/68.
((((Seal))))

CERTIFICATE

I, John C. Satterfield, one of the attorneys for Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of the Alabama State School Board of Education, and the other Appellants and Movants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 31st day of May, 1967, I served copies of the foregoing Motion for Extension of Time Under Rules 13 and 15 of the Rules of the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof with air mail postage prepaid to Ben Hardeman, Esquire, United States Attorney for the Middle District of Alabama, at Room 302, Federal Building, Montgomery, Alabama, and

by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C.

2. On the Plaintiffs and Plaintiff-Intervenor and Amicus Curiae, by mailing copies, in duly addressed envelopes, with air mail postage prepaid, to the respective attorneys of record as follows:

Ramsey Clark, Esquire
United States Attorney General
Washington, D. C.

St. John Barrett, Esquire
Department of Justice
Civil Rights Division
Washington, D. C.

Brian K. Landsberg, Esquire
Department of Justice
Civil Rights Division
Washington, D. C.

Solicitor General
Department of Justice
Washington 25, D. C.

Fred D. Gray, Esquire
34 North Perry Street
Montgomery, Alabama

Melvyn Zarr, Esquire
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

Henry M. Aronson, Esquire
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

This the 31st day of May, 1967.

/s/ John C. Satterfield
One of the Attorneys for the
Above Named Appellants
and Movants

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants.

Order Granting Extension of Thirty Days for Filing of Record and Jurisdictional Statement in the Supreme Court of the United States under Rules 13 and 15 of Such Court

This matter coming on to be heard upon motion of all of the appellants in the appeal which is now pending to the Supreme Court of the United States under Notice of Appeal filed in accordance with Rules 10 through 12 of the Rules of the Supreme Court of the United States, being fully advised in the premises, finding that under Rule 13 of the Rules of the Supreme Court of the United States, "any judge of the court whose decision is being appealed . . . may enlarge the time for the docketing of the case", and further finding that by sworn motion having the effect under the rules of this Court of an affidavit good cause has been shown for the enlargement of the time for the docketing of the case in the Supreme Court of the United States and the filing of the Jurisdictional Statement in this

case under Rules 13 and 15 of the Supreme Court of the United States, and the Court further finding that this Judge as "a judge of the court whose decision is being appealed" has full authority to enter this order:

IT IS THEREFORE ORDERED AND ADJUDGED that the time for the filing of the record herein be extended for thirty days, to-wit: to and including July 6, 1967, and that the Jurisdictional Statement to be filed in behalf of Lurleen Burns Wallace, Governor of the State of Alabama and President of the Alabama State Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer; and James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrill, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Word and Harold C. Martin, Members, Alabama State Board of Education, may be filed at any time on or prior to July 6, 1967.

ORDERED AND ADJUDGED this the 3 day of June, A. D. 1967.

/s/ Richard T. Rives
Member of the Three-Judge
Court Acting in the Above
Styled Cause

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants.

Motion for Extension of Time under Rules 13 and 15 of the Rules of the Supreme Court of the United States

This motion is filed to request an extension of time in the filing of the record by the Clerk of the United States District Court for the Middle District of Alabama, Eastern Division, and the Jurisdictional Statement by the appellants under Rule 15 of the Rules of the Supreme Court of the United States in behalf of Lurleen Burns Wallace, Governor of the State of Alabama and President Alabama State School Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer, and James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrill, W. M. Beck, Victor P. Poole, W. C. Davis Cecil Word and Harold C. Martin, Members, Alabama State Board of Education.

The movants show that John C. Satterfield is the leading counsel in this case; that as shown by prior motion filed herein, about eight weeks ago it was necessary that Mrs. John C. Satterfield undergo an operation which was of an emergency nature and extremely serious and which was performed at 1:00 A.M., and that she is still confined to her home as a result thereof; that his mother has, during the period here involved, suffered two massive heart attacks. That an order was granted upon such motion extending the time for the filing of the record and the Jurisdictional Statement to July 6, 1967. That, as the Jurisdictional Statement was being prepared by the undersigned affiant, he received a long distance telephone call from Los Angeles, California, that his daughter (who was visiting her brother in Los Angeles) was seriously ill and it will be necessary for this affiant to go immediately to Los Angeles to be of assistance to his daughter.

That the extension as asked in this motion will not prejudice the Plaintiffs or Plaintiff-Intervenor in this case. That due to the shortness of time between this date and the due date of the record and Jurisdictional Statement (July 6, 1967), it is impossible for any other attorney to complete the Jurisdictional Statement, obtain the printing thereof and have it filed during the time allowed.

That Rule 13 of the Rules of the Supreme Court of the United States, Paragraph (1) provides as follows:

> It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court not more than sixty days after the filing of the notice of appeal. But, for good cause shown, any judge of the court whose decision is being appealed or in which the notice of appeal is filed (or a justice of this court if

> application has first been made below), may enlarge the time for docketing the case. Where application under this rule is made to a justice of this court, Rule 34 (2) governs timeliness. All other applications hereunder must be presented to the judge in question before the expiration of the original sixty-day period.

That this motion is filed within the period set forth in Rule 34 (2) of the Rules of the Supreme Court of the United States.

That the Clerk of the United States District Court for the Middle District of Alabama, Eastern Division, is prepared to file the record with the Clerk of the Supreme Court of the United States as provided by the Rules of this Court and within the time required by the Rules of the Supreme Court. However, the Rules of the Supreme Court of the United States provide as follows in Rule 13 (2):

> Upon the filing in this court of the record brought up by appeal, counsel for the appellant shall enter his appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 33, forty copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case will then be placed on the appellate docket.

As the appellants and movants desire to make a full, complete and proper presentation of this matter to the Supreme Court of the United States, they move that there be allowed an additional thirty days after July 6, 1967, for the filing of the record and the Jurisdictional Statement as provided

in Rules 13 and 15 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

MacDonald Gallion
Attorney General of Alabama
Alabama State Office Building
Montgomery, Alabama
Gordon Madison
Assistant Attorney General of Alabama
State Capitol
Montgomery, Alabama
Nicholas S. Hare
Special Assistant Attorney General
Tyson Building
Montgomery, Alabama
Maury D. Smith
325 Bell Building
Montgomery, Alabama
John C. Satterfield
Masonic Building
Yazoo City, Mississippi
By /s/ John C. Satterfield
Attorneys for Appellants and Movants

Goodwyn, Smith & Bowman
325 Bell Building
Montgomery, Alabama
Satterfield, Shell, Williams and
Buford
First National Bank Building
Jackson, Mississippi
Of Counsel

STATE OF ALABAMA

Personally appeared before me the undersigned authority in and for said County and State, John C. Satterfield, one of the attorneys and the leading counsel in the above styled cause, who first being duly sworn states on oath that the matters and things set forth in the above Motion for Extension of Time Under Rules 13 and 15 of the Rules of the Supreme Court of the United States are true as therein stated.

/s/ John C. Satterfield

SWORN TO and subscribed before me on this the 27th day of June, 1967.

/s/ Richard T. Rives
Judge, U. S. Court of Appeals

CERTIFICATE

I, John C. Satterfield, one of the attorneys for Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of the Alabama State School Board of Education, and the other Appellants and Movants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 27th day of June, 1967, I served copies of the foregoing Motion for Extension of Time under Rules 13 and 15 of the Rules of the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof with air mail postage prepaid to Ben Hardeman, Esquire, United States Attorney for the Middle District of Alabama, at Room 302, Federal Building, Montgomery, Alabama, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C.

2. On the Plaintiffs and Plaintiff-Intervenor and Amicus Curiae, by mailing copies, in duly addressed envelopes, with air mail postage prepaid, to the respective attorneys of record as follows:

Ramsey Clark, Esquire
United States Attorney General
Washington, D. C.

St. John Barrett, Esquire
Department of Justice
Civil Rights Division
Washington, D. C.

Brian K. Landsberg, Esquire
Department of Justice
Civil Rights Division
Washington, D. C.

Solicitor General
Department of Justice
Washington 25, D. C.

Fred D. Gray, Esquire
34 North Perry Street
Montgomery, Alabama

Melvyn Zarr, Esquire
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

Henry M. Aronson, Esquire
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

This the 27th day of June, 1967.

/s/ John C. Satterfield
One of the Attorneys for the
Above Named Appellants
and Movants

APPENDIX 8

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants.

Order Granting Extension of an Additional Thirty Days for Filing of Record and Jurisdictional Statement in the Supreme Court of the United States under Rules 13 and 15 of Such Court

This matter coming on to be heard upon motion of all of the appellants in the appeal which is now pending to the Supreme Court of the United States under Notice of Appeal filed in accordance with Rules 10 through 12 of the Rules of the Supreme Court of the United States, being fully advised in the premises, finding that under Rule 13 of the Rules of the Supreme Court of the United States, "any judge of the court whose decision is being appealed. . . . may enlarge the time for the docketing of the case", and further finding that by sworn motion having the effect under the rules of this Court of an affidavit good cause has been shown for the enlargement of the time for the docketing of the case in the Supreme Court of the United

States and the filing of the Jurisdictional Statement in this case under Rules 13 and 15 of the Supreme Court of the United States, and the Court further finding that this Judge as "a judge of the court whose decision is being appealed" has full authority to enter this order:

IT IS THEREFORE ORDERED AND ADJUDGED that the time for the filing of the record herein be extended for thirty days, to-wit: to and including August 5, 1967, and that the Jurisdictional Statement to be filed in behalf of Lurleen Burns Wallace, Govrenor of the State of Alabama and President of the Alabama State Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer; and James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrill, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Word and Harold C. Martin, Members, Alabama State Board of Education, may be filed at anytime on or prior to August 5, 1967.

ORDERED AND ADJUDGED this the 27th day of June, A. D. 1967.

/s/ Richard T. Rives
Member of the Three-Judge
Court Acting in the Above
Styled Cause

APPENDIX 9

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE ET AL.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION ET AL.,
Defendants.

NOW COMES Ernest Stone in his capacity as State Superintendent of Education, one of the Defendants in this cause, and submits and files herewith a report to the Court, in accordance with the decree rendered herein on March 22, 1967, and more particularly the paragraph on page 8 thereof, which provides, "The State Superintendent of Education shall inform these local school systems that the desegregation plan is to be adopted within 20 days from the entry of this decree; and within 25 days from the entry of this decree the State Superintendent shall submit a report to this Court and to all parties informing them of the action taken by him to discharge this obligation and the results of that action."

The documents filed herewith include each desegregation plan for the school systems involved submitted to the Office of State Superintendent of Education listed in alphabetical form together with all communications by this Defendant to the said Superintendents of Education of each school system involved and all correspondence and forms that were submitted to the Office of State Superintendent of Education with said desegregation plans.

Attached hereto, marked Exhibit "A," is the transmittal letter from said Defendant dated April 15, 1967, with reference to the aforesaid documents.

Respectfully submitted,

/s/ Maury D. Smith
Of Counsel for said Defendant

Goodwyn, Smith & Bowman
325 Bell Building
Montgomery, Alabama

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing report was served upon each of the parties to this action through their respective attorneys of record by placing a copy thereof in the United States Air Mail, postage prepaid and properly addressed to them on this the 17 day of April, 1967.

/s/ Maury D. Smith
Of Counsel

STATE OF ALABAMA
DEPARTMENT OF EDUCATION
Montgomery, Alabama 36104
April 15, 1967

EXHIBIT "A"

Honorable Frank M. Johnson, Jr.
Chief Judge
United States District Court
Middle District of Alabama
FEDERAL BUILDING
Montgomery, Alabama

Re: Lee, et al. v. Macon County Board of Education, et al.—CA No. 604-E, March 22, 1967

Dear Judge Johnson:

The DESEGREGATION PLANS for Local School Systems that the above-captioned Court DECREE directed me

to submit to your Court on or before April 16, 1967, are submitted herewith.

Your attention is respectfully called to the order in which these Plans are submitted which is as follows:

(1) The DESEGREGATION PLANS for the City School Systems involved, and in alphabetical form, are submitted first. These DESEGREGATION PLANS are submitted to you exactly as they were submitted to the Office of the State Superintendent of Education except that they have been placed in a legal size manila folder along with a copy of my communications to the Superintendent of each City School System involved under the dates of March 28, 29, and 31, 1967.

(2) The DESEGREGATION PLANS for the County School Systems involved are submitted next in the same manner and containing the same information as those of the City School Systems.

(3) There is attached to the original DESEGREGATION PLANS all correspondence and forms that were submitted to the State Superintendent of Education along with the Plans.

(4) The dates on which the Plans for both City and County School Systems were received in this office are also included.

It is my trust that I have thus far complied with the directions of your Court, and I shall be glad to correct any mistakes that I may have made.

Respectfully submitted,

/s/ Ernest Stone
Ernest Stone
State Superintendent of Education

ES:mjf
Attachments

APPENDIX 10

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants.

Order Adding Parties Defendant, Requiring All Defendants to Show Cause Why the Added Defendants Should Not Be Required to Adopt Desegregation Plans Conforming to the Court's Decree and Granting Further Relief

(Filed April 24, 1967)

The United States, as plaintiff-intervenor and *amicus curiæ*, having filed its motion to add as parties defendant certain officials of the Autauga County, Bibb County, Cullman County, and Pickens County school systems, for an order to show cause why such additional defendants should not be required to adopt desegregation plans conforming to the standard embodied in the decree of this Court of March 22, 1967, and for further relief against the defendant Ernest Stone, and good cause appearing,

It is ORDERED that:

The Autauga County Board of Education; James T. Powell, President, and O. C. Bruner, B. H. Atchison, Walter

C. Evans, and Ralph Mims, members of the Autauga County Board of Education; John R. Hargis, Superintendent of Schools of Autauga County;

The Bibb County Board of Education; S. E. Belcher, Jr., President, and Ellington P. Jones, Henry Bolding, Britt Cox, and C. E. Hornsby, Jr., members of the Bibb County Board of Education; Francis B. Pratt, Superintendent of Schools of Bibb County;

The Cullman County Board of Education; Hoyt Perdue, President, and Jack Sterling, Lawton Willoughby, Derlan Harbison and Buel Hale, members of the Cullman County Board of Education; Earl T. York, Superintendent of Schools of Cullman County;

The Pickens County Board of Education; L. D. Vail, President, and J. L. Stone, Marvin Elmore, J. V. Park and Billie F. McCool, members of the Pickens County Board of Education, and Alan C. Burns, Superintendent of Schools of Pickens County, each be, and they hereby are, added as defendants to this action.

It is FURTHER ORDERED that all defendants, including those added by this order, appear before this Court on May 13th, 1967 at 9:30 a.m. in the courtroom of the United States District Court for the Middle District of Alabama in the United States Courthouse, Montgomery, Alabama, to show cause, if any they have, why the above-named boards and officials of the school systems of Autauga County, Bibb County, Cullman County, and Pickens County should not be ordered to adopt desegregation plans for their respective school systems meeting the standards embodied in the plan attached as exhibit "A" to this Court's decree of March 22, 1967, and why they should not be ordered to transmit such plans to the State Superintendent of Education for submission to this Court.

It is FURTHER ORDERED that the defendant Ernest Stone, as State Superintendent of Education, forthwith notify each of the following school systems that the desegregation plan which such system has adopted for all grades commencing with the 1967-68 school year and which was submitted to this Court by the State Superintendent on April 17, 1967, fails to meet the standards embodied in the plan attached as Exhibit "A" to the decree of March 22, 1967, and that a plan meeting such standards should be adopted and submitted to the State Superintendent:

Andalusia
Athens
Attalla
Brewton
Butler County
Carbon Hill
Cherokee County
Chilton County
Clarke County
Clay County
Colbert County
Conecuh County
Covington County
Dale County
Dallas County
DeKalb County
Demopolis
Etowah County
Eufaula
Florala
Florence
Tarrant
Thomasville
Troy
Franklin County
Geneva County
Greene County
Henry County
Houston County
Jackson County
Jasper
Lauderdale County
Limestone County
Linden
Marengo County
Marion City
Marion County
Morgan County
Muscle Shoals
Piedmont
Scottsboro
Selma
Shelby County
Talladega City
Tallapoosa County
Tuscaloosa City
Tuscaloosa County
Tuscumbia

and, more specifically, advising said school systems that their desegregation plans should be revised in the following regards:

1. Those of the above-named systems that have patterned their plans upon the model attached to the Court's decree but have omitted from their plans any of the provisions of the Court's decree or have changed any of the provisions of the Court's decree shall revise their plans to include all provisions of the Court's decree without material change except where specific variations from the model plan are required by circumstances peculiar to the particular school system making such change. If any such changes are retained in a plan as amended, the school system should set forth the particular justification for the change.

2. Those school systems that have submitted plans adopted to meet HEW standards for the 1965-66 school year or have submitted a copy of the explanatory notice commonly used in connection with HEW plans, should revise their plans to pattern them after the Court's model plan and should include all provisions of the model plan.

3. The Jasper and Muscle Shoals systems should supplement their plans by a specific assurance that they will enroll in the schools of their respective systems all Negro students residing therein and by including in their plans all provisions of the model plan that are applicable to a system that has discontinued operation of its traditionally Negro schools.

The defendant Ernest Stone shall complete the above-ordered action and shall submit a report of the results thereof to the Court and to the parties by May 4, 1967.

The Clerk is directed to issue summons for the additional defendants named in this order and to take the

necessary and appropriate steps to have the United States Marshal for this District serve a copy of such summons upon the added defendants together with this order and with copies of the following orders and papers heretofore filed in this case:

1. The motion for an order to show cause or, in the alternative, for further relief filed by the plaintiffs on September 22, 1966;

2. The order of this Court of September 30, 1966, denying the issuance of a contempt citation and setting a hearing on that part of the motion of the plaintiffs of September 22, 1966, seeking the desegregation of all the public schools of the State of Alabama;

3. This Court's memorandum, opinion, decree, and writ of injunction of March 22, 1967.

4. The motion of the United States to add parties defendant, for an order to show cause and for further relief, filed on April 22, 1967.

The Clerk shall also, upon the request of the said added defendants, make available copies of any pleadings, orders or decrees heretofore filed or entered in this cause.

DONE this 24th day of April, 1967.

/s/ Richard T. Rives
United States Circuit Judge
/s/ H. Hobart Grooms
United States District Judge
/s/ Frank M. Johnson, Jr.
United States District Judge

APPENDIX 11

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants.

Motion to Drop Added Defendants

NOW COME the Defendants Lurleen B. Wallace, in her capacity as Governor of the State of Alabama, and as President of the Alabama State Board of Education; The Alabama State Board of Education, its individual members and Ernest Stone, in his capacity as State Superintendent of Education and Secretary of the Alabama State Board of Education, and move the Court to drop as parties Defendant to this action the Bibb County Board of Education, its individual members; Francis B. Pratt, Bibb County Superintendent of Education; The Cullman County Board of Education, its individual members; Earl T. York, Cullman County Superintendent of Education; the Pickens County Board of Education, its individual members; Alan C. Burns, Pickens County Superintendent of Education, and as grounds for said motion assign: (1) Lack of jurisdiction. (2) The action against the said added Defendants should be maintained in the United States District Court for the Northern District of Alabama as a matter of proper venue.

In the alternative these Defendants pray for a severance of these actions involving additional Defendants.

WHEREFORE, these Defendants pray that the additional named Defendants be dropped as parties in this action.

/s/ MacDonald Gallion
Attorney General
State of Alabama
Montgomery, Alabama
/s/ John C. Satterfield
P. O. Box 466
Yazoo City, Mississippi
/s/ Hugh Maddox
Legal Advisor
Governor's Office
State Capitol
Montgomery, Alabama
/s/ Goodwyn, Smith & Bowman
325 Bell Building
Montgomery, Alabama

CERTIFICATE OF SERVICE

I certify that a copy of the within Motion was served upon each of the parties to this action by delivering a copy to their respective attorneys of record on this the 13th day of May, 1967.

/s/ Maury D. Smith
Of Counsel

APPENDIX 12

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants.

Order

(Filed May 18, 1967)

This cause having regularly come on for hearing on the Order of this Court of April 24, 1967 requiring the defendant school officials of Autauga County, Bibb County, Cullman County and Pickens County to show cause why they should not be ordered to adopt desegregation plans meeting the standards embodied in this Court's Order of March 22, 1967, upon the motion of the defendant state officials to drop said local school officials as party defendants, and upon the objections of the Bibb County Board of Education and its members to the motion of the United States for the said Order to Show Cause, and the parties having appeared by counsel, and the Court having received evidence and having heard argument of counsel, and

It appearing to the Court that:

1. The Autauga County Board of Education has adopted a plan of desegregation conforming in all regards to the model desegregation plan attached as Exhibit "A" to the Order of this Court of March 22, 1967 and has transmitted such plan by letter of April 27, 1967 from its counsel to State Superintendent Ernest Stone who in turn has submitted the plan to this Court.

2. By letter of May 1, 1967, the Superintendent of Schools of Cullman County transmitted to this Court a supplement to its desegregation plan, previously adopted, stating that, commencing with the 1967-68 school year, the Cullman County Board of Education would close the only traditionally Negro school maintained by the Board in the County and would transfer all of the Negro teachers presently assigned to that school to schools heretofore maintaned for white students. By further letter of May 8, 1967 from the Superintendent of Schools of Cullman County to this Court and by statements made by their counsel in open Court open the hearing of these motions, the Board of Education of Cullman County has assured that all Negro students residing within the territorial limits of the Cullman County School System will be educated in the schools of Cullman County.

3. The Pickens County Board of Education on May 12, 1967, filed with this Court an answer to the Show Cause Order attaching a desegregation plan which was adopted by the Pickens County Board of Education on May 9, 1967 and which conforms in all respects with the model plan attached as Exhibit "A" to the Order of this Court of March 22, 1967.

4. The Bibb County Board of Education, its members, and the Superintendent of Schools of Bibb County

have filed no response to the Order to Show Cause other than the "Objections" heretofore referred to and have offered no evidence to show cause why the Bibb County Board of Education should not be ordered to adopt and implement a plan of desegregation, other than the statement by their counsel that the Board has since March 22, 1967 directed certain questionnaires to the students and teachers in the Bibb County School System. The deposition of the Superintendent of Schools of Bibb County, which was offered into evidence by the United States upon the hearing and has been received by the Court, establishes that the Board of Education of Bibb County is operating a dual school system based on race, under which it maintains separate schools for Negro students, staffed solely by Negro personnel and attended solely by Negro students, and maintains separate schools for white children, staffed solely by white personnel and attended solely by white students. The Board maintains separate bus transportation systems for Negro and white students. The Board has failed to adopt any plan for the assignment of students on a non-racial basis meeting the requirements of this Court's Order of March 22, 1967, nor has it adopted any plan or taken any effective steps for the desegregation of the faculty or staff of the schools nor for the desegregation of the transportation systems. Counsel for the Board does not dispute these facts.

And the Court being of the view that:

1. This Court has jurisdiction of the subject matter raised by the Order to Show Cause, whether viewed as a proceeding ancillary to the main proceeding in this cause, or as a separate claim properly joinable with such main proceeding.

2. This Court has jurisdiction of the parties named in the Show Cause Order, and venue of the matters raised by that Order is properly in this Court.

3. The issues raised by the Show Cause Order with respect to the defendant boards and officials of Autauga County, Cullman County and Pickens County have become moot by their actions above described.

4. The failure of the defendant board and officials of Bibb County to adopt a plan of desegregation or otherwise take effective action to disestablish the dual system in Bibb County based on race and color violates the duty of said Board and officials under the 14th Amendment to the Constitution and prevents the full effectuation of this Court's Order of March 22, 1967.

NOW THEREFORE IT IS ORDERED:

1. The Motion of Lurleen B. Wallace, the Alabama State Board of Education, its members, and Ernest Stone to drop parties defendant is DENIED.

2. The Objection of the Bibb County Board of Education, its members and Francis B. Pratt to the motion of the United States is OVERRULED.

3. The defendant boards of education and officials of Autauga County, Cullman County, and Pickens County are discharged as parties defendant upon the ground that the issues raised by the Order to Show Cause are now moot as to them.

4. The Bibb County Board of Education, S. E. Belcher, Jr., President, and Ellington P. Jones, Henry Bolding, Britt Cox and C. E. Hornsby, Jr., members of the Bibb County Board of Education and Francis B. Pratt, Superintendent of Schools of Bibb County, together with

their officers, agents, employees, successors and all persons in active concert or participation with them are enjoined to adopt a desegregation plan for the Bibb County School System in the form attached to this Order and to fully carry out such plan.

DONE this 18th day of May, 1967.

/s/ Richard T. Rives
United States Circuit Judge
/s/ H. H. Grooms
United States District Judge
/s/ Frank M. Johnson, Jr.
United States District Judge

DESEGREGATION PLAN

The Bibb County Board of Education will take the following affirmative action to disestablish all state enforced or encouraged public school segregation and to eliminate the effects of past state enforced or encouraged racial discrimination in the operation of the school system:

I.

EXERCISE OF CHOICE

The following provisions will apply to all grades commencing with the 1967-68 school year:

A. *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving

as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this plan to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

B. *Annual Exercise of Choice.* All students, both white and Negro, will be required to exercise a free choice of schools annually.

C. *Choice Period.* The period for exercising choice will commence May 22, 1967 and end June 9, 1967, and in subsequent years will commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period will be given any preference because of the time within the period when such choice was exercised.

D. *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period will not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who exercised choice before the expiration of the choice period. Any student who has not exercised his choice of school within a week after school opens will be assigned to the school nearest his home where space is available under standards for determining available space which will be applied uniformly throughout the system.

E. *Public Notice.* On or within a week before the date the choice period opens, the school board will arrange for the conspicuous publication of a notice describing the provisions of this plan in the newspaper most generally circulated in the community. The text of the

notice will be substantially similar to the text of the explanatory letter sent home to parents. Publication as a legal notice will not be sufficient. Copies of this notice will also be given at that time to all radio and television stations serving the community. Copies of this plan will be posted in each school in the school system and at the office of the Superintendent of Education.

F. *Mailing of Explanatory Letters and Choice Forms.* On the first day of the choice period there will be distributed an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the school board) of each student, together with a return envelope addressed to the Superintendent. The text for the explanatory letter and choice form will essentially conform to the sample letter and choice form appended to this plan.

G. *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form will be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

H. *Content of Choice Form.* Each choice form will set forth the name and location of and grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of one parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, will be required or requested.

I. *Return of Choice Form.* At the option of the person completing the choice form, the choice may be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

J. *Choices Not on Official Form.* The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

K. *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices for their children under the conditions set forth in paragraph I-A of this plan and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student.

L. *Preference in Assignment.* In assigning students to schools, no preference will be given to any student for prior attendance at a school and except with the approval of the State Superintendent of Education in extraordinary circumstances, no choice will be denied for any reason other than overcrowding. In case of overcrowding at any school, preference will be given on the basis of proximity of the school to the homes of the students choosing it, without regard to race or color. Standards for determining overcrowding will be applied uniformly throughout the system.

M. *Second Choice Where First Choice Is Denied.* Any student whose choice is denied will be promptly notified in writing and given his choice of any school in the

school system serving his grade level where space is available. The student will have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

N. *Transportation.* Where transportation is generally provided, buses will be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing the school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is at least two miles from his residence. The school system will adopt non-discriminatory bus routes and criteria governing the availability of bus transportation to students, so that race will not be a basis for assigning students to school buses and overlapping and duplicative bus routes based on race will be eliminated. Prior to the choice period, parents and children will be advised that such routes and criteria will be adopted, and substantially prior to the opening of the 1967-68 school year the parents and children will be notified of the routes and criteria, in a readily understandable manner.

O. *Officials Not to Influence Choice.* At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any persons because of a choice made. If the school board employs professional guidance counselors, such persons will base their guidance and counseling on the individual student's particular personal, academic, and vocational needs. Such guidance and counseling by teachers as well as professional guidance counselors will be available to all students without regard to race or color.

P. *Protection of Persons Exercising Choice.* Within their authority, school officials are responsible for the protection of persons exercising rights under or otherwise affected by this plan. They will, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference will include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board will not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this plan. If officials of the school system are not able to provide sufficient protection, they will seek whatever assistance is necessary from other appropriate officials.

II.

PROSPECTIVE STUDENTS

Each prospective new student will be required to exercise a choice of schools before or at the time of enrollment. Each such student known to the school system will be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Where there is no preregistration procedure for newly entering students, copies of the choice forms will be available at the office of the Superintendent and at each school during the time the school is usually open.

III.

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student will be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other

extra-curricular activity) that may be conducted or sponsored by or affiliated with the school in which he is enrolled. A student attending school for the first time on a desegregated basis will not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, nonracially based rules of city, county, or state athletic associations dealing with the eligibiliy of transfer students for athletic contests. All school use or school sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, will be open to all persons without regard to race or color. All special educational programs conducted by the school system will be conducted without regard to race or color.

IV.

SCHOOL EQUALIZATION

A. *Inferior Schools.* In schools heretofore maintained for Negro students, the school system will take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white persons. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios will, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro

students, where such improvement would otherwise be required by this subparagraph, such school will be closed as soon as possible, and students enrolled in the school will be reassigned on the basis of freedom of choice. By October of each year, the school board will report to the State Superintendent of Education pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and will outline the steps to be taken and the time within which they will accomplish the equalization of such schools.

B. *Remedial Programs.* The school system will provide remedial education programs which permit students attending or who have previously attended all-Negro schools to overcome past inadequacies in their education.

V.

SCHOOL CONSTRUCTION AND CONSOLIDATION

To the extent consistent with the proper operation of the school system as a whole, the school board will, in locating and designing new schools, in expanding existing facilities, and in consolidating schools, do so with the object of eradicating past discrimination and of effecting desegregation. The school board will not build, consolidate or expand schools based on recommendations of any state survey conducted prior to March 1967 unless the state reapproves such building, consolidation or expansion. The school board will not fail to consolidate schools because desegregation would result.

VI.

FACULTY AND STAFF

A. *Faculty Employment and Assignment.* Race or color will not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers

and other professional staff members, including student teachers, except that race will be taken into account for the purpose of correcting the effect of the past segregated assignment of teachers in the dual system. Teachers, principals, and staff members will be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers will be assigned so that more than one teacher of the minority race (white or Negro) will be on a desegregated faculty. The school board will take affirmative steps to accomplish the desegregation of its school faculties, including substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year. The objective of the school system is that the pattern of teacher assignment to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school. The school system will accomplish faculty desegregation in a manner whereby the abilities, experience, specialties, and other qualifications of both white and Negro teachers in the system will be, insofar as administratively feasible, distributed evenly among the various schools of the system.

B. *Dismissals.* Teachers and other professional staff members will not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system will be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system will be evalu-

ated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the State Superintendent of Education.

VII.

REPORTS

A. *Report on Choice Period.* The school system will file with the State Superintendent of Education on or before June 10 of each year a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report will also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

B. *Report After School Opening.* The system will file with the State Superintendent of Education within 15 days after the opening of schools for the fall semester of each year a report setting forth the following information:

(1) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken on his request and the reasons therefor.

(2) The number of faculty vacancies, by school, that have occurred or been filled since the adoption of this plan or the latest report submitted pursuant to this subparagraph. This report shall state the race of the teacher employed to fill each such vacancy and

indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(3) The number of students by race, in each grade of each school.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next school year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all white or all Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 9, 1967*. You may mail it in the enclosed en-

*In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

velope, or deliver it by messenger or by hand to any school principal or to the office of the Superintendent at any time between May 22 and June 9. No one may require you to return your choice form before June 9, and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. The school board is rerouting buses and writing new rules for assigning students to buses, so that there will be no more overlapping bus routes and students will be assigned to buses without regard to race. (Delete if the school system does not provide transportation.)

Your school board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out successfully.

Sincerely,

Superintendent

CHOICE FORM

This form is provided for you to choose a school for your child to attend next school year. You have 18 days to make your choice. It does not matter which school your child attended last year, and does not matter whether the

school you choose was formerly a white or a Negro school. This form must be mailed or brought to the principal of any school in the system or to the office of the Superintendent (address), by June 9, 1967. A choice is required for each child.

Name of child .....
(Last) (First) (Middle)

Address .....

Name of parent or other adult serving as parent .....

If child is entering first grade, date of birth:

.....
(Month) (Day) (Year)

Grade child is entering .....

School attended last year .....

Choose one of the following schools by marking an X beside the name.

	Name of school	Grades Offered	Location
( )	.....	.....	.....
( )	(All schools in the district, the grades offered by each, and the location of each will be listed on the		
( )	form prior to its distribution to parents and students.)		
( )	.....	.....	.....

Signature .....

Date .....

.....

.....

To be filled in by Superintendent:

School assigned .....

APPENDIX 13

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants,

Order Adding Parties Defendant and Order to Show Cause

(Filed May 26, 1967)

The United States, as plaintiff-intervenor and *amicus curiae*, having filed its motion to add as parties defendant certain officials of the Marengo County, Linden City, Jasper City, Marion County and Thomasville City School Systems and for an order to show cause, and

It appearing to the Court that:

(1) On March 22, 1967, this Court entered its Order in this case permanently enjoining the defendant State Board of Education, its members and the State Superintendent of Education from discriminating on the basis of race in the operation or conduct of the public schools of Alabama and requiring them to take affirmative action to disestablish all state enforced or encouraged public school segregation and more particularly requiring the

State Superintendent of Education to notify certain named school systems that they were required to adopt a desegregation plan for all grades commencing with the 1967-68 school year meeting the standards embodied in a plan attached as Exhibit "A" to the decree and requiring that the State Superintendent of Education inform each of these local school systems that such plan was to be adopted within 20 days from the date of the decree and requiring that within 25 days from the date of the decree the State Superintendent submit a report to the Court and to all parties informing them what action has been taken by him in this connection and the result of such action.

(2) On April 17, 1967, the defendant Ernest Stone as State Superintendent of Education submitted to the Court and to the parties his report required as described in the preceding paragraph. With his report and in later supplements thereto, Superintendent Stone submitted desegregation plans adopted by school systems named in Section IV of this Court decree of March 22, 1967. Among these plans were plans adopted and submitted by the respective boards of education to be added as parties herein, each of which plan failed to meet the standards embodied in the plan attached as Exhibit "A" to the decree.

(3) On April 24, 1967, this Court entered an Order requiring the Alabama State Superintendent of Education to inform certain named school systems, including the Marengo County, Jasper City, Linden City, Marion County, and Thomasville City systems, that the plans they had adopted as a result of this Court's decree of March 22, 1967, failed to meet the standards embodied in that decree and that they should adopt a plan meeting such standards.

(4) In accordance with the Order of this Court of April 24, 1967, the Alabama State Superintendent of Edu-

cation sent letters to the superintendents of Marengo County, Jasper City, Linden City, Marion County and Thomasville City school systems advising them that their plans failed to meet the standards embodied in the decree of this Court and requesting that their respective boards of education supplement their plans to meet such standards and to submit the plans as supplemented to the State Superintendent for submission to this Court.

(5) Since being advised of the inadequacies of its plan by the Alabama State Superintendent of Education as above described, the Marengo County Board of Education has failed to supplement its plan to correct its deficiencies or otherwise to adopt a desegregation plan meeting the standards embodied in Exhibit "A" to the decree of this Court, as more particularly set forth below.

(a) The Marengo County Board of Education, its members and Frederick Ramsey as superintendent of schools of Marengo County are maintaining a dual school system based upon race and color. Prior to the 1965-66 school year, Marengo County traditionally maintained two sets of schools, one for white students staffed exclusively by white personnel, and the other for Negro students staffed exclusively by Negro personnel. During the first two weeks of the 1965-66 school year the Marengo County Board of Education announced that students would be permitted to apply for enrollment in schools traditionally attended by students of the opposite race. No applications for such enrollment were made for the 1965-66 school year. Fifteen applications on behalf of Negro students to attend traditionally white schools were made for the 1966-67 school year. Thereafter, Frederick Ramsey, as Superintendent of Schools of Marengo County, contacted the parents of each of these 15 applicants. None of these Negro applicants attended traditionally white schools

for the 1966-67 school year and the student population of the Marengo County School System remains completely segregated into separate schools upon the basis of race.

(b) The faculty provision of the Marengo County desegregation plan submitted to Superintendent Stone fails to provide that race will be taken into account for the purpose of counteracting the effects of the past segregated assignment of faculty and staff in Marengo County. The Marengo County Board of Education has taken no steps to desegregate the faculty and staff of the schools in the Marengo County School System.

(c) The School Equalization provision of the desegregation plan submitted to Superintendent Stone by the Marengo County Superintendent provides that by an undetermined date an unspecified number of unnamed inadequate schools will be closed. The record in this case shows that the Marengo County Board of Education maintains nine elementary schools and two junior high schools for Negro students having enrollments that fail to meet the minimum student enrollment requirements of the State of Alabama Board of Education. The names of these schools, the number of teachers assigned, to each, and the students enrolled, are as follows:

Name	Grade	Teachers	Students
Shiloh	1-5	1	40
Taylor	1-5	1	26
Varner	1-5	1	23
Glover	1-4	2	56
St. John	1-6	2	43
Dayton	1-6	3	69
Exmoor	1-5	1	21
Jones Chapel	1-6	2	59
Putnam	1-6	2	52
Myrtlewood	1-8	4	101
Jefferson	1-9	5	146

The first eight of these schools are designated in a 1962-63 school survey by the Alabama State Department of Education as being located in buildings that should be abandoned, and the last three were designated as being in buildings suitable for temporary use. The survey further designated Shiloh, Taylor, Varner, Glover, St. John, and Dayton elementary schools as being located on sites that should be abandoned.

(d) Grades 7-12 in all schools attended by white children in the Marengo County System are accredited by the Alabama State Department of Education. The Marengo County Training School and the John Essex High School, attended by Negro children, are not so accredited, nor are any of the 5 junior high schools, attended by Negro children.

(6) Since being advised of the inadequacies of its plan by the Alabama State Superintendent of Education as above described, the Linden City Board of Education has failed to amend or supplement its plan to correct its deficiencies or otherwise to adopt a desegregation plan meeting the standards embodied in Exhibit "A" to the decree of this Court in the following particulars:

(a) The Linden City Board of Education, its members and Ray Jones as Superintendent of Schools of Linden, Alabama are maintaining a dual school system based upon race and color in the city of Linden traditionally maintained two sets of schools, one for white students staffed exclusively by white personnel, and the other for Negro students staffed exclusively by Negro personnel. No Negro students were enrolled in schools traditionally attended by students of the opposite race for the 1965-66 school year. Three Negro students enrolled in traditionally white schools for the 1966-67 school year.

(b) The Linden City Board of Education has taken no steps to desegregate its faculty and staff in the schools of the Linden City School System and the faculty provision of their desegregation plan submitted to Superintendent Stone fails to adopt the specifics embodied in the plan attached as Exhibit "A" to this Court's decree.

(c) The desegregation plan of the Linden City School System submitted to Superintendent Stone, while stating that the Linden City Board of Education adopts the Court's language for the equalization of facilities and programs, does not include specific provisions that the program of instruction offered in each school in the system will be the same. Students who attend traditionally white schools are offered a greater number of courses in their program of instruction than students attending traditionally Negro schools.

(7) Since being advised of the inadequacies of its plan by the Alabama State Superintendent of Education as above described, the Thomasville City Board of Education has failed to amend or supplement its plan to correct its deficiencies or otherwise to adopt a desegregation plan meeting the standards embodied in Exhibit "A" to this Court's decree as more particularly set forth below:

(a) The Thomasville City Board of Education, its members, and Robert T. Short as Superintendent of Schools of Thomasville, Alabama are maintaining a dual school system based upon race and color in Thomasville, Alabama. Prior to the 1965-66 school year the city of Thomasville traditionally maintained two sets of schools, one for white students staffed exclusively by white personnel, the other for Negro students staffed exclusively by Negro personnel. During the 1965-66 school year there were no Negro students enrolled in traditionally white schools. Two Ne-

gro students enrolled in traditionally white schools for the 1966-67 school year.

(b) The Thomasville City Board of Education has taken no steps to desegregate the faculty and staff in the schools in the Thomasville City School System and the faculty provision of their desegregation plan submitted to Superintendent Stone fails to adopt any of the specifics embodied in the plan attached as Exhibit "A" to this Court's decree.

(c) The School Equalization provision of the desegregation plan submitted to Superintendent Stone by the Thomasville City Superintendent fails to provide for specific remedial programs which will permit students who have attended previously all-Negro schools to overcome past inadequacies in their education.

(d) The School Equalization Section also fails to provide for the specific equalization of physical facilities and instructional programs. The traditionally white Thomasville High School is accredited by both the Alabama State Department of Education and the Southern Association of Colleges and Secondary Schools, while the traditionally Negro A. L. Martin High School is not accredited by either.

(8) Since being advised of the inadequacies of its plan by the Alabama State Superintendent of Education as above described, the Jasper City Board of Education has failed to amend or supplement its plan to correct its deficiencies or otherwise to adopt a desegregation plan meeting the standards embodied in Exhibit "A" to this Court's decree as more particularly set forth below:

(a) Prior to the 1965-66 school year, no Negro students attended the Jasper City Schools. In the 1965-66 school year, one Negro attended the Jasper City Schools

and in the 1966-67 school year, six Negro students are attending the Jasper City Schools. All other Negro children residing in the City of Jasper who attend schools do so at schools operated by Walker County. During the 1965-66 school year, 230 white students residing outside the City of Jasper in Walker County were transported to Jasper City Schools.

(b) The desegregation plain initially submitted to Dr. Stone provided for the assignment of all students enrolled in the Jasper City School System to the school nearest their home.

(c) Subsequently, the Jasper City Board of Education amended its desegregation plan to provide for freedom of choice of schools for all students, but which did not provide for the assignment of faculty and staff members to correct the effect of past discrimination against Negroes as required by this Court's decree of March 22, 1967.

(d) The Jasper City School System does not now employ any Negro faculty or staff members.

(9) Since being advised of the inadequacies of its plan by the Alabama State Superintendent of Education, the Marion County Board of Education has failed to adequately supplement its plan to correct its deficiencies or otherwise to adopt a desegregation plan meeting the standards embodied in Exhibit "A" to the decree of this Court, as more particularly set forth below:

(a) The Marion County Board of Education, its members and Estes Hudson as Superintendent of Schools of Marion County are maintaining a dual school system based upon race and color. Through the 1966-67 school year, Marion County has traditionally maintained two sets of schools, one for white students staffed exclusively by

white personnel, and the other for Negro students staffed exclusively by Negro personnel. No Negro students have ever been enrolled in schools traditionally attended by students of the opposite race.

(b) There are approximately 150 Negro students residing in Marion County. These students are educated in two schools (Ada Hanna High School and Guin High School), each of which serves grades one through twelve.

NOW THEREFORE it is ORDERED that:

The Marengo County Board of Education; M. W. McKee, Chairman, and T. A. Moseley, J. M. DeLoach, Carl Walker and Thomas Miller, members of the Marengo County Board of Education, Frederick D. Ramsey, Superintendent of Schools of Marengo County;

The Linden City Board of Education; M. F. Conway, Chairman, and Roy Barkley, C. N. Williams, Larry Walters and W. W. Scott, members of the Linden City Board of Education, Ray Jones, Superintendent of Schools of Linden City;

The Jasper City Board of Education; Ted Jackson, Chairman, and Ike May, Charles Wiggins, Jr., Mrs. Dick Wright, and Vernon Shaw, members of the Jasper City Board of Education, Bob H. Songer, Superintendent of Schools of Jasper City;

The Marion County Board of Education; Earl Hampton, Chairman, Lee Hightower, A. J. Wood, Carl Byrd, and Robert Hester, members of the Marion County Board of Education, and Estes Hudson, Superintendent of Schools of Marion County;

The Thomasville City Board of Education; Dr. James M. Spinks, Chairman, and S. Cecil Ross, W. Johnson McCall, C. Dickie Bozeman, and George E. Gibson, mem-

bers of the Thomasville City Board of Education, Robert T. Short, Superintendent of Schools of Thomasville City, each be, and they hereby are, added as defendants to this action.

It is FURTHER ORDERED that the Marengo County Board of Education, M. W. McKee, Chairman, T. A. Moseley, J. M. DeLoach, Carl Walker and Thomas Miller, members, Frederick D. Ramsey, Superintendent of Schools of Marengo County; the Linden City Board of Education, M. F. Conway, Chairman, Roy Barkley, C. N. Williams, Larry Walters, and W. W. Scott, members, Ray Jones, Superintendent of Schools of Linden City; the Thomasville City Board of Education, Dr. James M. Spinks, Chairman, S. Cecil Ross, W. Johnson McCall, C. Dickie Bozeman and George E. Gibson, members, Robert T. Short, Superintendent of Schools of Thomasville City appear before this Court on June 9, 1967 at 9:30 a.m. in the courtroom of the United States District Court for the Middle District of Alabama in the United States Courthouse, Montgomery, Alabama, to:

(1) Show cause why they should not adopt and fully implement a plan of desegregation for their respective school systems in accordance with the model plan attached as Exhibit "A" to the Decree of this Court of March 22, 1967;

(2) Show cause, as to each teacher presently employed in their respective school systems, why he cannot be assigned for the 1967-68 school year to a school traditionally attended by students and staffed by teachers of the opposite race and why each staff vacancy not now filled or which may hereafter arise in any school for the 1967-68 school year cannot be filled by a person of the race opposite to the race of the persons who have here-

tofore been assigned to fill staff positions in that school, to the end that there shall be substantial desegregation of faculties in each school for the 1967-68 school year.

(3) Show cause why they should not be ordered to take all steps necessary to obtain state accreditation for all grades above the sixth grade in all schools in their respective systems.

It is FURTHER ORDERED that the Marion County Board of Education, Earl Hampton, Chairman, Lee Hightower, A. J. Wood, Carl Byrd, and Robert Hester, members of the Marion County Board of Education, and Estes Hudson, Superintendent of Schools of Marion County appear before this Court on June 9, 1967 at 9:30 a.m. in the courtroom of the United States District Court for the Middle District of Alabama in the United States Courthouse, Montgomery, Alabama, to show cause why they should not be ordered to close for the 1967-68 school year, and thereafter, each of the following schools: Ada Hanna High School and Guin High School, and assign all students who formerly attended these two schools to other schools in the Marion County School System; and to show cause, as to each teacher presently employed at the Ada Hanna High School and the Guin High School, why he cannot be assigned for the 1967-68 school year to one of the remaining schools in the system.

It is FURTHER ORDERED that the Marengo County Board of Education, M. W. McKee, Chairman, T. A. Moseley, J. M. DeLoach, Carl Walker and Thomas Miller, members, Frederick D. Ramsey, Superintendent of Schools of Marengo County appear before this Court on June 9, 1967 at 9:30 a.m. in the courtroom of the United States District Court for the Middle District of Alabama in the United States Courthouse, Montgomery, Alabama, to show cause why they should not be ordered to close for the

1967-68 school year, and thereafter, each of the following schools: Shiloh Elementary, Taylor Elementary, Varner Elementary, Glover Elementary, St. John Elementary, Dayton Elementary, Exmoor Elementary, Jones Chapel, and for the 1968-69 school year, and thereafter: Putnam Elementary, Myrtlewood Jr. High and Jefferson Jr. High.

It is FURTHER ORDERED that the Linden City Board of Education, M. F. Conway, Chairman, Roy Barkley, C. N. Williams, Larry Walters, and W. W. Scott, members, Ray Jones, Superintendent of Schools of Linden City appear before this Court on June 9, 1967 at 9:30 a.m. in the courtroom of the United States District Court for the Middle District of Alabama in the United States Courthouse, Montgomery, Alabama, to show cause why the capacity of each school in the system, for the purpose of determining when choices should be rejected by reason of overcrowding, should not be so fixed as to distribute the student population among the schools in such a manner as to substantially equalize the pupil-teacher and the pupil-classroom ratio among the schools.

It is FURTHER ORDERED that the Thomasville City Board of Education, Dr. James M. Spinks, Chairman, S. Cecil Ross, W. Johnson McCall, C. Dickie Bozeman and George E. Gibson, members, Robert T. Short, Superintendent of Schools of Thomasville City appear before this Court on June 9, 1967 at 9:30 a.m. in the courtroom of the United States District Court for the Middle District of Alabama in the United States Courthouse, Montgomery, Alabama, to show cause why the capacity of each school in the system, for the purpose of determining when choices should be rejected by reason of overcrowding, should not be so fixed as to distribute the student population among the schools in such a manner as to substantially equalize the pupil-teacher and the pupil-classroom ratio among the schools.

It is FURTHER ORDERED that the Jasper City Board of Education, Ted Jackson, Chairman, and Ike May, Charles Wiggins, Jr., Mrs. Dick Wright, and Vernon Shaw, members, Bob H. Songer, Superintendent of Schools of Jasper City appear before this Court on June 9, 1967 at 9:30 a.m. in the courtroom of the United States District Court for the Middle District of Alabama in the United States Courthouse, Montgomery, Alabama, to show cause if any they have, why an Order should not be entered requiring them to enroll in the schools of the Jasper City Schools System all Negro students residing within the City of Jasper; and if said defendants show cause why all Negro children residing in the City of Jasper cannot be enrolled in the schools of the Jasper City system for the 1967-68 school year, then to show cause why an Order should not be entered requiring them to adopt a plan of desegregation in conjunction with the Walker County School System in which such Negro students are enrolled, meeting the standards embodied in the plan attached as Exhibit "A" to the decree of this Court of March 22, 1967, including the standards for faculty desegregation contained in Section VI.

The Clerk is directed to issue summons for the additional defendants named in this order and to take the necessary and appropriate steps to have the United States Marshal for this District serve a copy of such summons upon the added defendants together with this order and with copies of the following orders and papers heretofore filed in this case:

1. The motion for an order to show cause or, in the alternative, for further relief filed by the plaintiffs on September 22, 1966;

2. The order of this Court of September 30, 1966, denying the issuance of a contempt citation and setting a

hearing on that part of the motion of the plaintiffs of September 22, 1966, seeking the desegregation of all the public schools of the State of Alabama;

3. This Court's memorandum, opinion, decree, and writ of injunction of March 22, 1967.

4. The order of this Court adding parties defendant and requiring added defendants to show cause, filed April 24, 1967.

5. The motion of the United States to add parties defendant and for an order to show cause filed on May 25, 1967.

The Clerk shall also, upon the request of the said added defendants, make available copies of any pleadings, orders or decrees heretofore filed or entered in this cause.

DONE this 26th day of May, 1967.

/s/ Richard T. Rives
United States Circuit Judge
/s/ H. H. Grooms
United States District Judge
/s/ Frank M. Johnson, Jr.
United States District Judge

APPENDIX 14

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants,

THE BIBB COUNTY BOARD OF EDUCATION, ELLINGTON P. JONES, HENRY BOLDING, BRITT COX, C. E. HORNSBY, JR., and FRANCIS B. PRATT,
Added as Parties Defendant on Motion of the United States Plaintiff-Intervenor.

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that the defendants, The Bibb County Board of Education, Ellington P. Jones, Henry Bolding, Britt Cox, C. E. Hornsby, Jr., and Francis B. Pratt, appeal to the Supreme Court of the United States from the Order, Judgment and Decree (designated therein as "Order") rendered and entered in the United States District Court, Middle District of Alabama, Eastern Division, in the above entitled action against said defendants (and particularly and separately from that part of said order overruling the objection of said defendants to the motion of the U. S. (§ 2) and that part enjoining said defendants to adopt and carry out a desegregation plan

for the school system in the form attached to said order (§ 4), and the Writ of Injunction issued against said defendants pursuant thereto, all dated and entered May 18, 1967, by the three-judge court constituted pursuant to §§2281 and 2284, Title 28, United States Code, composed of United States Circuit Judge Richard T. Rives and United States District Judges H. H. Grooms and Frank M. Johnson, Jr.

This appeal is taken pursuant to §1253, Title 28, United States Code.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and shall include in said transcript the following:

(1) The summons requiring said defendants to answer the Motion of the United States, filed in said cause on April 24, 1967.

(2) Motion of the United States to add The Bibb County Board of Education, Ellington P. Jones, Henry Bolding, Britt Cox, C. E. Hornsby, Jr., and Francis B. Pratt as parties defendant, and for an order to show cause and for further relief, filed in said cause on April 22, 1967, together with the attachments thereto.

(3) Order of the Court in said cause adding The Bibb County Board of Education, Ellington P. Jones, Henry Bolding, Britt Cox, C. E. Hornsby, Jr., and Francis B. Pratt as parties defendant, and to show cause why the said defendants should not be required to adopt a desegregation plan or plans conforming to the Court's Decree of March 22, 1967, together with the attachments served upon the said defendants, such as the motion and order to show cause, or the alternative for further relief, of the

plaintiffs, filed in this Court on September, 22, 1966, the Order of this Court filed September 30, 1966, the Writ of Injunction issued by this Court in said cause, filed March 22, 1967, the Decree of this Court in said cause filed March 22, 1967, the opinion and findings of this Court filed March 22, 1967, in said cause, transcript of all pleadings, orders and other Court papers served upon the said defendants, along with the summons of this Court filed April 24, 1967.

(4) The Writ of Injunction issued by this Court against said defendants, filed May 18, 1967, the Order and Judgment of this Court, filed March 18, 1967, in said cause (designated as "Order"), together with the form of desegregation plan, explanatory letter and choice form attached thereto and made a part of said Order.

(5) The pleading of said defendants characterized as an "Objection", and also containing a prayer that the Objection also be treated in the alternative and separately as a Motion under Rule 12(b) of the Rules of Civil Procedure, filed May 13, 1967.

(6) Transcript of the proceedings at the hearing on May 13, 1967.

III. The following questions are presented by this appeal: Did the Court err by taking the actions listed below?

1. Granting a permanent mandatory injunction in the Order of March 22, 1967, compelling the original defendants to act so as to materially and adversely affect the rights of the appellant, The Bibb County Board of Education, although said appellant had not been served with process and was not actually or constructively before the Court—all in violation of the Constitution of the United States and particularly the due process clause of the Fifth Amendment.

2. Granting a mandatory injunction requiring the appellant, The Bibb County Board of Education, to adopt the specific plan of desegregation attached to the said Order and Judgment of the District Court from which this appeal is taken, filed May 18, 1967, contrary to the Constitution of the United States and particularly the Tenth and Eleventh Amendments thereof, and in violation of the Constitutional separation of governmental powers between the United States of America and the States, and also such separation of powers between the judicial, executive and legislative branches of the States and the United States.

3. Entering the Order filed April 24, 1967, adding the appellant, The Bibb County Board of Education, and the individual appellants named in this Notice of Appeal, to show cause why said Board of Education and its members should not be required to adopt the plan of desegregation above described, and thereby improperly joining said The Bibb County Board of Education as a party defendant after the final judgment of March 22, 1967, had been entered, such joinder not being in proper implementation or enforcement of the said Judgment of March 22, 1967.

4. Entering the Order filed April 24, 1967, adding the appellant, The Bibb County Board of Education, and the individual appellants named in this Notice of Appeal, to show cause why said Board of Education and its members should not be required to adopt the plan of desegregation above described, and thereby improperly joining said The Bibb County Board of Education as a party defendant after the final judgment of March 22, 1967, had been entered, such joinder not being authorized either under §1391, Title 28, United States Code, or any other venue statute, and not being proper under Rule 20 of

the Federal Rules of Civil Procedure, or any other statute of rule.

5. In overruling by the said Order and Judgment of May 18, 1967, above described, the Objection of the said defendant, The Bibb County Board of Education, and the other individual appellants named herein, to the Motion of the United States (characterized as an "Objection"), and in the alternative the Motion under Rule 12(b), Rules of Civil Procedure.

6. Holding by the Order and Judgment filed May 18, 1967, that the Court had jurisdiction of the cause presented by the Motion of the United States filed April 22, 1967.

7. Holding by the Order and Judgment filed May 18, 1967, that the Court had venue of the cause presented by the Motion of the United States filed April 22, 1967.

8. Holding by said Decree that the Court had jurisdiction of the defendant, The Bibb County Board of Education, and the individuals named herein as appellants.

9. Holding by said Decree that the Court had venue of the defendant, The Bibb County Board of Education, and the individual appellants named in this notice, all of whom were shown without dispute to be residents of the Northern District of Alabama.

10. Holding by said Decree that the defendant, The Bibb County Board of Education, and the individual appellants named in this Notice, were properly joined as parties defendant.

11. In overruling in the hearing on May 13, 1967, before this Court the objection of the defendant, The Bibb County Board of Education, and the other individual defendants, to the introduction of the deposition of the Su-

perintendent of Schools of Bibb County, and in receiving said deposition in evidence over said objection, such deposition having been taken prior to any addition of said The Bibb County Board of Education and the other appellants named in this notice, were added or made parties defendant, and there being no representation of these appellants or presence of them or their representatives at the taking of said deposition.

12. Holding by said Order and Judgment, filed May 18, 1967, that the Motion of the United States seeking to require said The Bibb County Board of Education to show cause why the said plan of desegregation should not be filed, stated a claim upon which relief could be granted.

Respectfully submitted,

Reid B. Barnes
Exchange Security Bank Building
Birmingham, Alabama 35203
Attorney for the Defendant, The Bibb County Board of Education, and the other said named Defendants

PROOF OF SERVICE

I, Reid B. Barnes, attorney for the Defendant, The Bibb County Board of Education, and the other individual defendants named in the foregoing Notice of Appeal, Ellington P. Jones, Henry Bolding, Britt Cox, C. E. Hornsby, Jr., and Francis B. Pratt, hereby certify that on the 16th day of June, 1967, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto as follows:

1. On the United States, by mailing a copy thereof to Ben Hardeman, Esq., United States Attorney for the

Middle District of Alabama, Room 302, Federal Building, Montgomery, Alabama, in a duly addressed envelope, with postage prepaid, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid to The Solicitor General, Department of Justice, Washington, D. C.

2. On the Plaintiffs and Plaintiff-Intervenor, by mailing copies thereof in a duly addressed envelope, with first class postage prepaid, to the respective attorneys of record as follows:

Ramsey Clark, Esq.
United States Attorney General
Washington, D.C.

St. John Barrett, Esq.
Department of Justice
Civil Rights Division
Washington, D. C.

Fred D. Gray, Esq.
34 North Perry Street
Montgomery, Alabama

Melvyn Zarr, Esq.
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

Henry M. Aronson, Esq.
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

3. On the other Defendants in said cause by mailing copies in a duly addressed envelope as follows:

McDonald Gallion, Esq.
Attorney General
Montgomery, Alabama

Hugh Maddox, Esq.
Office of the Governor
State of Alabama
Capitol Building
Montgomery, Alabama

John C. Satterfield, Esq.
P. O. Box 466
Yazoo City, Mississippi

Goodwyn, Smith & Bowman
325 Bell Building
Montgomery, Alabama

Reid B. Barnes
Attorney for the Defendant,
The Bibb County Board of
Education, and the other
said named defendants

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants,

THE BIBB COUNTY BOARD OF EDUCATION, ELLINGTON P. JONES, HENRY BOLDING, BRITT COX, C. E. HORNSBY, JR., AND FRANCIS B. PRATT,
Added as Parties Defendant on Motion of the United States, Plaintiff-Intervenor.

Notice of Appeal to the United States Court of Appeals for the Fifth Circuit

Notice is hereby given that the defendants, The Bibb County Board of Education, Ellington P. Jones, Henry Bolding, Britt Cox, C. E. Hornsby, Jr., and Francis B. Pratt, appeal to the United States Court of Appeals for the Fifth Circuit from the Order, Judgment and Decree (designated therein as "Order") rendered and entered in the United States District Court, Middle District of Alabama, Eastern Division, in the above entitled action and the Writ of Injunction issued against said defendants pursuant thereto, all dated and entered May 18, 1967, against said defendants (and particularly and separately from that part of said order overruling the objection of said defendants to the motion of the U. S. (§ 2) and that part enjoin-

ing said defendants to adopt and carry out a desegregation plan for the school system in the form attached to said order (§ 4), by and in the United States District Court, Middle District of Alabama, Eastern Division, in the above styled cause.

Dated this 16th day of June, 1967.

Respectfully submitted,

Reid B. Barnes
Exchange Security Bank Building
Birmingham, Alabama 35203
Attorney for the Defendant, The Bibb County Board of Education, and the other said named Defendants

PROOF OF SERVICE

I, Reid B. Barnes, attorney for the Defendant, The Bibb County Board of Education, and the other individual defendants named in the foregoing Notice of Appeal, Ellington P. Jones, Henry Bolding, Britt Cox, C. E. Hornsby, Jr., and Francis B. Pratt, hereby certify that on the 16th day of June, 1967, I served copies of the foregoing Notice of Appeal of the United States Court of Appeals for the Fifth Circuit on the several parties thereto as follows:

1. On the United States, by mailing a copy thereof to Ben Hardeman, Esq., United States Attorney for the Middle District of Alabama, Room 302, Federal Building, Montgomery, Alabama, in a duly addressed envelope, with postage prepaid, and by mailing a copy on a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C.

2. On the Plaintiffs and Plaintiff-Intervenor, by mailing copies thereof in a duly addressed envelope, with first class postage prepaid, to the respective attorneys of record as follows:

Ramsey Clark, Esq.
United States Attorney General
Washington, D. C.

St. John Barrett, Esq.
Department of Justice
Civil Rights Division
Washington, D. C.

Fred D. Gray, Esq.
34 North Perry Street
Montgomery, Alabama

Melvyn Zarr, Esq.
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

Henry M. Aronson, Esq.
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

3. On the other defendants in said cause by mailing copies in a duly addressed envelope as follows:

McDonald Gallion, Esq.
Attorney General
Montgomery, Alabama

Hugh Maddox, Esq.
Office of the Governor
State of Alabama
Capitol Building
Montgomery, Alabama

John C. Satterfield, Esq.
P. O. Box 466
Yazoo City, Mississippi

Goodwyn, Smith & Bowman
325 Bell Building
Montgomery, Alabama

Reid B. Barnes
Attorney for the Defendant,
The Bibb County Board of
Education, and the other
said named defendants

APPENDIX 15

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants,

THE BIBB COUNTY BOARD OF EDUCATION, ELLINGTON P. JONES, HENRY BOLDING, BRITT COX, C. E. HORNSBY, JR., AND FRANCIS B. PRATT,
Added Defendants.

Cross Designation of Record for Certification

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, the United States designates the following portions of the record in this case to be certified by the Clerk of this Court to the Clerk of the Supreme Court on the appeal by the defendants Bibb County Board of Education, Ellington P. Jones, Henry Bolding, Britt Cox, C. E. Hornsby, Jr., and Francis B. Pratt, from the order of this Court entered May 18, 1967, in addition to those portions of the record designated by the above named defendants in their notice of appeal filed June 17, 1967:

1. The deposition of Francis B. Pratt introduced by the United States as an exhibit in the hearing held May 13, 1967;

2. Government's Exhibits Nos. 4, 6-11, 13-57, 66-76, 84-91, 95-141, 142 A, 143 A, the school survey reports in 144 only for Piedmont (1964-65), Oneonta (1965-66), Blount County (1965-66), Marengo County (1962-63), Calhoun County (1964-65), Walker County (1963-64), Fayette County (1963-64), Clarke County (1964-65), and Escambia County (1964-65), 147-149, 150 A, 151-158, 162-165, and 167-172 introduced at the hearing on November 30 and December 1-2, 1966;

3. Plaintiffs' Exhibits Nos. 1, 3-7, 10-13, and 16 introduced at the hearing on November 30, and December 1-2, 1966;

4. The following depositions and exhibits attached thereto, introduced at the hearing on November 30, and December 1-2, 1966:

J. C. Blair
Clyde G. Horton
G. F. Ingram
Marvin H. Killingsworth
George Layton

5. All of the pleadings, motions and orders filed in the District Court in this case since February 2, 1964 through March 22, 1967, including all opinions entered by the District Court; and

6. The transcript of the hearing held on November 30 and December 1-2, 1966.

All portions of the record designated in this cross-designation are already part of the record on the appeal from this court's order of March 22, 1967, and are here designated to be part of the single certified record in both

appeals, without duplication, as provided in Rule 12(5) of the Supreme Court Rules.

Respectfully submitted,

John Doar
Assistant Attorney General
Ben Hardeman
United States Attorney
St. John Barrett
Brian K. Landsberg
Merle W. Loper
Attorneys
Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 1967, I served the Cross Designation of Record for Certification, to which this is attached, upon each party in this case by sending by United States air mail a copy thereof, postage prepaid, to each attorney of record as follows:

Honorable Hugh Maddox
Legal Advisor to the Governor
State Capitol
Montgomery, Alabama 36104

Goodwyn, Smith and Bowman
Attorneys at Law
325 Bell Building
Montgomery, Alabama 36104

Mr. John Satterfield
P. O. Box 466
Yazoo City, Mississippi 39194

Honorable MacDonald Gallion
Attorney General, State of Alabama
State Capitol
Montgomery, Alabama 36104

Attn: Gordon Madison, Assistant Attorney General

Mr. Fred D. Gray
Attorney at Law
34 North Perry Street
Montgomery, Alabama 36104

Mr. Melvin Zarr
NAACP Legal Defense and
Educational Fund, Inc.
10 Columbus Circle
New York, New York 10019

Mr. Reid B. Barnes
Exchange Security Bank Building
Birmingham, Alabama 35203

Merle W. Loper
Attorney
Department of Justice
Washington, D. C. 20530

APPENDIX 16

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al.,
Defendants.

Order

(Filed June 14, 1967)

This cause having regularly come on for hearing on the Order of this Court of May 26, 1967 requiring the defendant school officials of Marengo County, Linden City, Jasper City, Marion County and Thomasville City to show cause why they should not be ordered to adopt desegregation plans meeting the standards embodied in this Court's Order of March 22, 1967 and to show cause why they could not take certain steps described in that Order to carry out such plans, and the parties having appeared by counsel and the Court having received evidence and having heard argument of counsel, and

It appearing to the Court that:

A. *Marion County School System*

1. Approximately 4,000 white students are enrolled in 14 schools and 149 Negro students enrolled in another

two schools of the County school system. No Negro students are attending schools with white children for the current school year. Only white teachers are assigned to the 14 schools attended by white children and only Negro teachers are assigned to the two schools attended by Negro children. This distribution of the students and faculty among the schools by race has resulted from an official practice of maintaining schools on a dual racial basis.

2. The Guin High School is one of the two schools maintained by the Marion County School System for the education of Negroes. It is located in the City of Guin and serves 72 students in grades 1-12. This enrollment is below the minimum standard of 525 students set by the Alabama State Department of Education for the operation of a satisfactory program in a 12-grade school. The staff of Guin High School consists of a principal and four teachers. The physical facilities of the Guin High School are old, dilapidated, and inadequate.

3. Ada Hanna School, the other school maintained by the defendant Marion County Officials for the education of Negroes, is a relatively new, well-planned school plant with adequate facilities for either a secondary or elementary program. It is presently attended by 48 students in the elementary grades, 16 in the junior high school grades and 13 in the high school grades. Within five or six miles of Ada Hanna the school system maintains two nine-grade schools for white children. The first of these schools, Byrd Junior High School, has 90 students, 24 of them in grades 7-9. The other of these schools, Gravel Springs Junior High School, has 131 students, with 35 of them in grades 7-9. The Alabama State Department of Education in 1960 recommended that each of these schools be maintained only for elementary students.

4. The defendant Marion County Officials are maintaining Guin High School and Ada Hanna School as 12-grade schools for the purpose of perpetuating a dual school system based upon race and color. No reasonable explanation for the continued operation of these two schools in the present manner appears from the record other than the perpetuation of racial segregation.

5. A plan of desegregation and amendments thereto adopted by the school system fails to embody substantial provisions contained in Attachment "A" to this Court's Decree of March 22, 1967.

B. *Thomasville City School System*

1. The school system educates approximately 785 white students in a school staffed solely with white teachers, and 800 Negro students in a school staffed solely by Negro teachers. During the current school year two Negro students have attended the school traditionally attended by white students only.

2. A plan of desegregation and amendments thereto adopted by the school system fails to embody substantial provisions contained in Attachment "A" to this Court's Decree of March 22, 1967.

C. *Marengo County School System*

1. The defendant Marengo County Officials are presently maintaining two white schools staffed entirely by white personnel and attended by approximately 800 white students, and 17 schools staffed solely by Negro personnel and attended by approximately 3,600 Negro students. Although the Marengo County System offered students a choice of schools for the current school year, no Negro students chose schools traditionally maintained for white children and no white students chose schools traditionally maintained for Negroes.

2. The record shows that the Marengo County Systems is presently maintaining the following small, inadequate schools for Negro students:

Name	Grade	Teachers	Students
Shiloh	1-5	1	40
Taylor	1-5	1	26
Varner	1-5	1	23
Glover	1-4	2	56
St. Johns	1-6	2	43
Dayton	1-6	3	69
Exmoor	1-5	1	21
Jones Chapel	1-6	2	59
Putnam	1-6	2	52
Myrtlewood	1-8	4	101
Jefferson	1-9	5	146

In responding to the show cause order the Marengo County defendants have stated that they will close the Dayton, Varner, Glover, and Exmoor Schools prior to the commencement of the 1967-68 school year; will close the Taylor, St. Johns, and Jones Chapel School commencing with the 1968-69 school year, and will close the remainder of the schools named in the show cause order as soon as it is financially feasible. Counsel for the school board has stated in open court that the board will accelerate the closing of the Taylor School one year to the commencement of the 1967-68 school year, and the Shiloh School to the commencement of the 1968-69 school year. Counsel for the United States has accepted these commitments as sufficient response to that portion of the show cause order dealing with closing of inadequate schools.

3. The Marengo County School System has submitted to the State Superintendent of Education a desegregation plan that varies from the language used in Exhibit

"A" to this Court's Decree of March 22, 1967. The variance most objected to by the plaintiffs and the United States involves the insertion of the words "if possible" at the end of the sentence in the Court's plan which reads, "Teachers, principals, and staff members will be assigned to schools so that more than one teacher of the minority race (white or Negro) will be on a desegregated faculty." Counsel for the school board urge that this variance in the language involves no change in the substance of their obligation under Section VI of the Court plan and that the board intends no such change.

4. In their response to the show cause order, the defendant officials outlined steps they are taking to obtain State accreditation for secondary schools that have been traditionally maintained for Negroes. Counsel for the United States has accepted these representations as a sufficient response to the portion of the show cause order relating to accreditation.

5. At the suggestion of the Court, Counsel for the school board agreed to submit to the Court within 15 days a report setting forth the specific steps taken by the board and the results achieved between this date and the date of the report to reassign teachers within the system and to fill any faculty vacancies within the system so as to effect desegregation of faculties as required by the desegregation plan. This report includes information regarding the reassignment of teachers now assigned to schools scheduled for closing by the beginning of the 1967-68 school year, and the steps taken to afford a further choice of schools to students who have heretofore elected to attend the schools now scheduled to be closed.

D. *Linden City School System*

1. The school system maintains two schools. One is staffed solely by white personnel and is presently at-

tended by 756 white students and 3 Negroes. The other, staffed solely by Negro personnel, is attended by 801 Negroes. Each school serves all 12 grades.

2. In their response to the order to show cause, the defendant school officials have submitted a desegregation plan, supplemented by certain additional written assurances, that includes all of the provisions in the Court's model plan. The language of the faculty provision, however, varies in exactly the same manner that the language of the faculty provision in the Marengo County plan varies from the Court's language. The same representations by counsel for the school board with respect to the Marengo County plan have been made with respect to this plan.

3. In their response to the show cause order the defendant school officials have further asserted that the school attended by Negroes is in fact accredited by the State. Counsel for the United States concedes this and has withdrawn the portion of the Government's motion for a show cause order on this point. The Government has also withdrawn the portion of its motion related to disparity of pupil-teacher and classroom-teacher ratios between the two schools.

4. At the suggestion of the Court, counsel for the school board agreed to submit to the Court within 15 days a report setting forth the specific steps taken by the board and the results achieved between this date and the date of the report to reassign teachers within the system and to fill any faculty vacancies within the system so as to effect desegregation of faculties as required by the desegregation plan.

E. *Jasper City School System*

1. The Jasper City Board of Education maintains schools, staffed solely by white personnel, that have been traditionally attended solely by white students. For the current school year, six Negroes and approximately 1,750 white students attended the Jasper City Schools.

2. Two schools, one serving grades 1-12 and traditionally attended by Negro students and the other serving grades 9-12 and traditionally attended by white students, are operated within the City of Jasper by the Walker County School System.

3. Approximately 500 Negro students living within the City of Jasper attend schools other than those operated by the Jasper City School System. The Jasper City School System maintains no school traditionally attended by Negro students.

4. Approximately 230 white students who are residents of Walker County and who live outside the city limits of Jasper attend the Jasper City Schools.

5. The Jasper City Board has submitted a plan of desegregation and amendments thereto which fail to embody substantial provisions relating to the desegregation of faculty and staff, contained in Attachment "A" to this Court's decree of March 22, 1967.

6. At the suggestion of the Court, counsel for the school board agreed to submit to the Court within 30 days a report setting forth the specific steps taken by the board with respect to:

(a) The amendment of the board's plan of desegregation so as to include the provision relating to desegregation of faculty and staff contained in Attachment "A" to this Court's decree of March 22, 1967;

(b) The implementation of an additional 20-day choice period for all students who did not exercise a choice during the choice period previously held by the school board; and

(c) The desegregation of faculty and staff in accordance with the goals and objectives contained in Section VI of Attachment "A" to this Court's decree of March 22, 1967.

NOW THEREFORE IT IS ORDERED:

1. The Marion County Board of Education, Earl Hampton, Chairman, Lee Hightower, A. J. Wood, Carl Byrd, and Robert Hester, members of the Marion County Board of Education, and Estes Hudson, Superintendent of Schools of Marion County, together with their officers, agents, employees, successors and all persons in active concert or participation with them, are enjoined to:

(a) adopt a desegregation plan for the Marion County School System in the form attached as Exhibit "A" to this Court's decree of March 22, 1967, and ~~to~~ fully carry out such plan;

(b) close all grades of the Guin High School prior to the start of the 1967-68 school year and assign each teacher now employed at the Guin High School to other schools in the Marion County School System in a manner to effect the desegregation of faculties in the system;

(c) discontinue grades 10, 11 and 12 at the Ada Hanna High School prior to the beginning of the 1967-68 school year;

(d) provide each student who has heretofore chosen to attend any grade in the Guin High School or any of grades 10 through 12 in the Ada Hanna High School for the 1967-68 school year with an additional 15-day choice

period within which to choose another school in the Marion County School System;

(e) formulate a plan by which, commencing with the 1968-69 school year, grades 7 through 9 will be offered at no more than one of the following three schools: Byrd, Ada Hanna and Gravel Springs; and

(f) serve upon the plaintiffs and the United States and submit to the Court, within 30 days of the date of this order, a report which shall describe all steps taken to implement paragraphs 1(a) through (e), above, and the results thereof.

2. The Thomasville City Board of Education, Dr. James M. Spinks, Chairman, and S. Cecil Ross, W. Johnson McCall, C. Dickie Bozeman, and George E. Gibson, members of the Thomasville City Board of Education, and Robert T. Short, Superintendent of Schools of Thomasville City, together with their officers, agents, employees, successors and all persons in active concert or participation with them, are enjoined to:

(a) adopt a desegregation plan for the Thomasville City System in the form attached as Exhibit "A" to this Court's decree of March 22, 1967;

(b) desegregate the faculties of their schools, in accordance with such plan, either by inducing voluntary transfers by teachers, the filling of vacancies, or, if they cannot achieve faculty desegregation by such means, then by the assignment and transfer of teachers from one school to the other; and

(c) serve upon the plaintiffs and the United States and submit to the Court, within 20 days of the date of this order, a report which is to include all steps taken to

implement paragraphs (a) and (b), above, and the results thereof.

In view of the assurances given to the Court by counsel for the defendant school officials of the Linden City, Marengo County and Jasper City Boards of Education in response to the order to show cause, no order will be entered against the officials of these three school systems at the present time.

Done, this the 14th day of June, 1967.

/s/ Richard T. Rives
United States Circuit Judge
/s/ H. H. Grooms
United States District Judge
/s/ Frank M. Johnson, Jr.
United States District Judge

APPENDIX 17

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE ET AL.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION ET AL.,
Defendants.

Order

(Filed June 27, 1967)

The records of this Court reflect that on June 14, 1967, an order was entered in this cause requiring the defendant school officials of Marengo County and Linden City to take certain affirmative steps to adopt and put into effect the standards embodied in this Court's order of March 22, 1967, and to submit to this Court a report setting forth the specific steps taken by the boards and the results achieved.

It now appears to the Court that the school system for the City of Linden files a report with this Court regarding the specific steps taken by said Board and the results achieved in reassigning teachers within the system so as to effect the desegregation of the faculty, as required by this Court's desegregation plan of March 22, 1967, for the school year 1967-68. It appears, therefore, that the City of Linden school officials have adopted a plan of desegregation conforming, in all material respects, to the model desegregation plan attached as Exhibit "A"

to the order of this Court of March 22, 1967, have transmitted such plan to the State Superintendent of Education and also to this Court, and have taken specific steps to implement and put into effect said desegregation plan as required by the order of this Court. The issues raised by the show cause order made and entered herein on May 26, 1967, as that order relates to the school officials of the City of Linden have, by reason of the actions of said officials as above described, become moot.

As to the school officials of Marengo County, Alabama, it appears that, pursuant to the order of this Court made and entered herein on June 14, 1967, said officials have filed with the Clerk of this Court a motion for an extension of time to July 15, 1967, within which to submit to the Court their report setting forth the specific steps taken by said board and the results achieved in complying with the requirements set forth in the order of this Court made and entered herein on March 22, 1967.

Now, therefore, it is ORDERED that:

(1) The defendant Board of Education and officials of the City of Linden are discharged as parties defendant upon the ground that the issues raised by the order to show cause are now moot as to them;

(2) The motion of the defendant Board of Education and officials of Marengo County, Alabama, for an extension of time to July 15, 1967, within which to show cause, as required by the order of this Court made and entered herein on May 26, 1967, is granted.

Done, this the 26 day of June, 1967.

/s/ Richard T. Rives
United States Circuit Judge
/s/ H. H. Grooms
United States District Judge
/s/ Frank M. Johnson, Jr.
United States District Judge

APPENDIX 18

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE ET AL.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION ET AL.,
Defendants.

Order Adding Parties Defendant

(Filed July 14, 1967)

On March 22, 1967, this Court entered its order in this case permanently enjoining the defendant State Board of Education, its members and the State Superintendent of Education from discriminating on the basis of race in the operation or conduct of the public schools of Alabama and requiring them to take affirmative action to disestablish all State enforced or encouraged public school segregation and more particularly requiring the State Superintendent of Education to notify certain named school systems that they were required to adopt a desegregation plan for all grades commencing with the 1967-68 school year meeting the standards embodied in a plan attached as Exhibit "A" to the decree and requiring that the State Superintendent of Education inform each of these local school systems that such plan was to be adopted within 20 days from the date of the decree and requiring, further, that the State Superintendent submit a report to

this Court and all parties informing them what action had been taken by him in this connection and the results of such action.

Subsequently, as ordered by this Court, the defendant Ernest Stone as State Superintendent of Education submitted to the Court and to the parties his report as required. With this report the State Superintendent of Education submitted the desegregation plans adopted by the several school systems named in the court decree of March 22, 1967. Among these plans were plans adopted and submitted by the Lanett City school system, Lanett, Alabama. An examination of the desegregation plan promulgated and adopted by the Lanett City Board of Education reflects that said plan meets the standards embodied in the plan attached as Exhibit "A" to the court's decree. Subsequently the Lanett City school system in the implementation of its plan conducted a free choice period; the conduct of said free choice period by the said system, according to the reports filed with this Court, meets in every respect the requirements of this Court's order. Reports filed with this Court subsequent to the filing of the plan by the Lanett School Board reflect that the Board is in the process of implementing the plan as filed insofar as its facilities, activities and other programs that are conducted or may be conducted or sponsored by the said school system are concerned. These reports as presented further reflect that the Lanett City school system is engaged in the process of, as required by the order of this Court and the plan filed by said school board, a school equalization program and, further, that said school board has taken affirmative steps to accomplish the desegregation of its school faculties in each of the schools operated by said school board effective with the 1967-68 school year.

The City of Lanett School Board now orally reports to this Court through its Superintendent, J. T. Greene, that

the United States Department of Health, Education and Welfare, acting pursuant to Title VI of the 1964 Civil Rights Act and the regulations promulgated thereunder, has terminated federal financial assistance for the Lanett City school system effective this date. According to the report and the request by the Lanett City school system for the assistance of this Court in this matter, the Superintendent for said school system has been informed by James R. Dunn, Attorney for the United States Department of Health, Education and Welfare, that the reason for the termination of federal financial assistance to this school system is that "the board did not have enough mixing as a result of their freedom of choice plan."

This Court is aware that Congress has placed upon the Department of Health, Education and Welfare and its officers, by virtue of Title VI of the 1964 Civil Rights Act, an obligation to see that federal funds and federal financial support do not go to any state-supported program—or any program for that matter—in which there is discrimination based upon race or color. This of course includes school systems. It is also recognized that the Secretary of Health, Education and Welfare and the United States Commissioner of Education in carrying out this policy are obliged to assure themselves that there is no such discrimination. However, we are cognizant of a regulation of the Department of Health, Education and Welfare approved by the President of the United States on December 3, 1964, and which therefore has the force and effect of law, 45 CFR 80.4(c), which requires that with respect to an elementary or secondary school system, "assurance of compliance" as prerequisite to obtaining federal financial assistance "shall be deemed to be satisfied" if such school system is subject to a final order of a court of the United States for the desegregation of such school system and if

such school system gives assurance that it will comply with such order. The records of this Court reflect that on April 15, 1967, this Court and the other parties herein involved, including the State Superintendent of Education, were advised by a representative from the United States Department of Justice that if the school systems named in the order of March 22, 1967, adopted this court's plan and submitted a copy to the Department of Health, Education and Welfare together with an assurance that they would comply with said order such would meet the Title IV requirements insofar as the Department of Health, Education and Welfare was concerned. This Court is informed, and the records of this case reflect, that the Lanett City school system has in all respects complied with the order of this Court and complied with the said requirements of the Department of Health, Education and Welfare.

Under such circumstances the action now being taken by the Secretary of Health, Education and Welfare and the United States Commissioner of Education, acting through their various representatives, in terminating federal financial assistance to the Lanett City school system, serves to thwart the implementation of the order of this Court of March 22, 1967. For this reason it appears that John W. Gardner, Secretary of Health, Education and Welfare, F. Peter Libassi, United States Commissioner of Education, and James R. Dunn, Attorney for the Department of Health, Education and Welfare, should, pursuant to Rule 19, Federal Rules of Civil Procedure, be joined as parties defendant in this action. The reason for this joinder is that in the opinion of this Court complete relief cannot be accorded those individuals that are already parties without said joinder of these additional parties and, further, that these additional parties claim an interest relating to the subject of this action and are so officially situated that a final disposition of this action in their absence may as a practical matter be impaired or impeded.

In consideration of the foregoing, it is the ORDER, JUDGMENT and DECREE of this Court that John W. Gardner, Secretary of Health, Education and Welfare, F. Peter Libassi, United States Commissioner of Education, and James R. Dunn, Attorney for the United States Department of Health, Education and Welfare, be and each is hereby made a party defendant in this cause.

Done, this the 14th day of July, 1967.

/s/ Richard T. Rives
United States Circuit Judge
/s/ H. H. Grooms
United States District Judge
/s/ Frank M. Johnson, Jr.
United States District Judge

APPENDIX 19

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE ET AL.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION ET AL., JOHN D. GARDNER, as Secretary of Health, Education and Welfare of the United States; F. PETER LIBASSI, United States Commissioner of Education, and JAMES R. DUNN, Attorney, United States Department of Health, Education and Welfare,
Defendants.

Temporary Restraining Order and Order Setting Cause for Hearing

(Filed July 14, 1967)

In consideration of the matters set forth by this Court in the order made and entered herein on this date adding as parties defendant John W. Gardner, as Secretary of Health, Education and Welfare of the United States, F. Peter Libassi, United States Commissioner of Education, and James R. Dunn, Attorney, United States Department of Health, Education and Welfare, it appears that it is necessary and appropriate, in order to protect the jurisdiction of this Court, afford all parties to this action complete relief, adjudicate all interests relating to the subject of this action and prohibit implementation of the order of this

Court made and entered March 22, 1967, from being thwarted and impeded, to temporarily restrain the newly added defendants as herein named from terminating any federal financial assistance, by virtue of the authority granted the said newly added defendants under Title VI of the 1964 Civil Rights Act, or any other federal financial assistance program, to the Lanett City School System, Lanett, Alabama, or to any other school system listed by this Court in its order made and entered herein on March 22, 1967.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court that the defendants John W. Gardner, as Secretary of Health, Education and Welfare of the United States, Peter F. Libassi, United States Commissioner of Education, and James R. Dunn, Attorney for the United States Department of Health, Education and Welfare, together with their agents, officers, successors and all others acting in concert or participation with them, be and each is hereby enjoined from terminating any federal financial assistance to the Lanett City Schools, Lanett, Alabama, or any other school or school system listed by this Court in the order made and entered herein on March 22, 1967. until further order of this Court.

It is the further ORDER, JUDGMENT and DECREE of this Court that this cause be and the same is hereby set for a hearing for the purpose of determining whether this temporary restraining order should be enlarged into a preliminary and/or permanent injunction, said hearing to commence at 9:30 a.m., Saturday, July 22, 1967, in the United States District Courtroom, Montgomery, Alabama.

It is further ORDERED that the Attorney General of the United States, or his designated representatives, present to this Court upon said hearing the necessary and appropriate evidence upon the issues herein involved to the

extent that this Court will be enabled to fully adjudicate all matters then presented. It is further ORDERED that any and all parties in this cause, including the Board of Education of the City of Lanett, Lanett, Alabama, be and they are hereby granted the opportunity to present evidence to the Court upon the hearing scheduled for July 22, 1967, upon the issues herein involved.

The Clerk of this Court is ORDERED and DIRECTED to take the necessary steps to have the United States Marshal for this district serve a copy of this restraining order upon the Honorable Ben Hardeman, United States Attorney, Middle District of Alabama, Montgomery, Alabama, and by registered mail copies upon the Honorable Ramsey Clark, Attorney General, United States Department of Justice, Washington, D. C., and by registered mail upon John W. Gardner, as Secretary of Health, Education and Welfare of the United States, F. Peter Libassi, United States Commissioner of Education, and James R. Dunn, Attorney for the United States Department of Health, Education and Welfare.

Done, this the 14th day of July, 1967.

/s/ Richard T. Rives
United States Circuit Judge
/s/ H. H. Grooms
United States District Judge
/s/ Frank M. Johnson, Jr.
United States District Judge

APPENDIX 20

Opinion of the Justices.

No. 180.

Supreme Court of Alabama.

Feb. 18, 1964.

Questions were propounded by the Governor to the Justices of the Supreme Court of Alabama relating to authority of State Board of Education to place, assign and transfer pupils from one public school to another within a city or county school system, to transfer or reassign teachers from one public school to another within such a system, to order city or county boards of education to provide transportation for students to and from certain public schools within such a system, to close public schools, and to order a city or county board of education to provide financial assistance to parents or guardians of students under the Alabama Grant-in-Aid Law. The Justices of the Supreme Court were of the opinion that the power and authority referred to was in the city or county boards of education, not the State Board of Education, and, therefore, no constitutional question was presented.

Questions answered.

1. Courts Key 208

Supreme Court is authorized to render advisory opinions to Governor only on important constitutional questions. Code 1940, Tit. 13, § 34.

2. Schools and School Districts Key 47

Authority of State Board of Education to exercise general control and supervision over county and city boards of education does not include authority to exercise powers and authority which Legislature had specifically con-

ferred upon county and city boards of education. Code 1940, Tit. 52, §§ 1 et seq., 14.

3. Schools and School Districts Key 154

City and county boards of education, as local boards of education, have authority concerning placement, assignment, and transfer of pupils from one public school to another within a city or county school system. Laws 1957, p. 483, §§ 3, 4.

4. Schools and School Districts Key 141(1)

City and county boards of education have authority to transfer or reassign teachers from one public school to another public school within a city or county school system. Laws 1957, p. 483, § 6.

5. Schools and School Districts Key 11

City and county boards of education have right to close public schools within city or county school system. Laws 1957, p. 723, §§ 1-3.

6. Schools and School Districts Key 148½

Authority to award grants in aid to certain school children is vested in county and city boards of education, not State Board of Education. Laws 1957, p. 723.

7. Schools and School Districts Key 159½

State Board of Education lacks authority to furnish, direct, and control transportation of pupils.

8. Schools and School Districts Key 159½

Matter of transportation of pupils in county school system is under control and authority of county board of education. Laws 1957, p. 483, § 4.

The Honorable George C. Wallace
Governor of Alabama
State Capitol
Montgomery, Alabama

Dear Sir:

Your requests under date of February 10, 1964, for advisory opinions are respectfully acknowledged. Although you have made two requests, we believe that they may be answered in one opinion. The questions you pose are as follows:

"1. Would a law of the State of Alabama which purports to confer upon the State Board of Education of Alabama the authority to place, assign and transfer pupils from one public school to another public school within a city or county school system be in violation of Section 262 of the Constitution of Alabama of 1901?

"2. Would a law of the State of Alabama which purports to confer upon the State Board of Education of Alabama the authority to transfer or reassign teachers from one public school to another public school within a city or county school system be in violation of Section 262 of the Constitution of Alabama of 1901?

"3. Would a law of the State of Alabama which purports to confer upon the State Board of Education of Alabama the authority to order the city or county boards of education to provide transportation for students to and from certain public schools within a city or county school system be in violation of Section 262 of the Constitution of Alabama of 1901?

"4. Would a law of the State of Alabama which purports to confer upon the State Board of Education of Alabama the authority to close public schools within a city or county school system be in violation of Section 262 of the Constitution of Alabama of 1901?

"5. Would a law of the State of Alabama which purports to confer upon the State Board of Education of Alabama the authority to order a City or County Board of Education to provide financial assistance to parents or guardians of students under the Grant-in-Aid Law of the State of Alabama as set forth in Title 52 of the 1940 Code of Alabama as amended be in violation of Section 262 of the Constitution of Alabama of 1901?"

[1] It is with the utmost respect that we call to your attention the fact that members of this court are authorized to render advisory opinions to the Governor only "on important constitutional questions."—§ 34, Title 13, Code 1940; In re Opinion of the Justices, 254 Ala. 177, 47 So.2d 655. So, however much is our inclination and desire to defer to the wishes of the Governor and give answers to the specific questions propounded, we must decline to do so.

This for the reason that in so far as we have been able to determine after a careful research of the laws which bear upon the duties, authority and responsibility of the State Board of Education of Alabama, we have found no law which is subject to the construction that the Legislature of Alabama has attempted to give to the said State Board of Education the authority to "place, assign and transfer pupils from one public school to another public school within a city or county school system"; or, "to transfer or reassign teachers from one public school to another public school within a city or county school system"; or, "to provide transportation for students to and from certain public schools within a city or county school system"; or, "to close public schools within a city or county school system"; or, "to order a city or county board of education to provide financial assistance to parents or guardians of students under the Grant-in-Aid Law of the State of Alabama."

In coming to this conclusion we have, of course, not overlooked the provisions of § 14, Title 52, Code 1940, which reads:

> "The state board of education shall exercise, through the state superintendent of education and his professional assistants, general control and supervision over the public schools of the state, except the University, the Alabama Polytechnic Institute [Auburn University], and the Alabama College, and shall consult with and advise through its executive officer and his professional assistants, county boards of education, city and town boards of education, superintendents of schools, school trustees, attendance officers, principals, supervisors, and interested citizens, and shall seek in every way to direct and develop public sentiment in support of public education."

[2] However broad may be the powers of the State Board of Education, and certainly we do not herein attempt to define or delineate those powers, we think it clear that the authority to exercise general control and supervision over the county and city boards of education does not include the authority to exercise the powers and authority which the Legislature has specifically conferred upon such local boards.

[3] We point out that in regard to the placement, assignment and transfer of pupils from one public school to another public school within a city or county school system, the Legislature of Alabama has conferred such authority on the city and county boards of education, referred to as the "local boards of education." See §§ 3 and 4 of the Act which became effective on August 26, 1957, without the approval of the Governor, Acts of Alabama 1957, Regular Session, Vol. 1, p. 483.

[4] In regard to the authority to transfer or reassign teachers from one public school to another public

school within a city or county school system, it is conferred upon local boards of education by the provisions of § 6 of the Act which became effective on August 26, 1957, without the approval of the Governor, Acts of Alabama, 1957, Regular Session, Vol. 1, p. 483.

[5] Relative to the right to close public schools within a city or county school system, the Legislature of Alabama has conferred that right on local boards of education under the terms and provisions of §§ 1, 2 and 3 of Act No. 528, which became effective without the approval of the Governor on September 16, 1957, General Acts of Alabama, Regular Session 1957, p. 723. Such was the view of the individual Justices of this court expressed in In re Opinions of the Justices, 275 Ala. 547, 156 So.2d 639, where we said:

> "* * * Without undertaking an exhaustive study of the legislative acts which provide for school operation, we are of opinion that the authority to open and close schools is placed in the local school board which operates the school, subject, perhaps, to some supervision by the state board." (156 So.2d, 642)

[6] It is apparent from a reading of In re Opinion of the Justices, 275 Ala. 547, 156 So.2d 639, that it was the opinion of the Justices that the words, "each board of education," as used in Act No. 528, *supra*, referred to local boards of education and, consequently, it must follow that the authority to award grants in aid to certain school children is vested in the local boards of education, that is, the county and city boards of education rather than in the state board of education.

[7, 8] In regard to the powers and authority to furnish, direct and control the transportation of pupils, certain it is that no such authority is specifically conferred upon the state board of education and as to those students

within the jurisdiction of county boards of education, it is reasonable to infer that the Legislature intended that the matter of transportation of pupils in that system should come under the control and authority of the county board of education, inasmuch as the Legislature saw fit to provide that one of the factors to be considered by local boards in the matter of assignment and transfer of pupils from one school to another was dependent upon "the availability of transportation facilities." See § 4 of the Act which became effective on August 26, 1957, without the approval of the Governor, Acts of Alabama 1957, p. 483. As to city boards of education, the Legislature has expressly placed upon the city boards of education the authority to purchase school busses when in the opinion of the city boards of education they are necessary to the proper conduct of the educational activities under the jurisdiction of the city boards of education.—Act No. 885, approved September 19, 1953, Acts of Alabama 1953, p. 1191.

It necessarily follows from the laws referred to above that the authority and power which you assume in your requests for opinion to be in the State Board of Education is not in that Board, but in the socalled local boards. Hence, no constitutional question is presented by your inquiries.

Respectfully submitted,

J. Ed Livingston
Chief Justice
Thomas S. Lawson
Robert T. Simpson
John L. Goodwyn
Pelham J. Merrill
James S. Coleman, Jr.
Robert B. Harwood
Justices.

APPENDIX 21

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

Civil Action No. 604-E

ANTHONY T. LEE and HENRY A. LEE, by Detroit Lee and Hattie M. Lee, their parents and next friends; ET AL., Plaintiffs,

UNITED STATES OF AMERICA, Plaintiff and Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION (Harry D. Raymon, Chairman, Madison Davis, John M. Davis, B. O. Dukes and F. E. Guthrie) and C. A. PRUITT, Superintendent of Schools of Macon County, Alabama, Defendants.

(Filed February 7, 1967)

The Honorable Frank M. Johnson, Jr., United States District Judge for the Middle District of Alabama, to whom an application for injunction and other relief has been presented in the above styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of three judges, I, Elbert P. Tuttle, Chief Judge of the Fifth Circuit, hereby designate the Honorable Richard T. Rives, United States Circuit Judge, and the Honorable Harlan Hobart Grooms, United States District Judge for the Northern District of Alabama, to serve with Judge Johnson as members of, and with him to constitute the said court to hear and determine the action.

WITNESS my hand this 6th day of February, 1964.

/s/ Elbert P. Tuttle
Chief Judge Fifth Circuit

APPENDIX 22

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION et al., JOHN D. GARDNER, as Secretary of Health, Education and Welfare of the United States; F. PETER LIBASSI, United States Commissioner of Education, and JAMES R. DUNN, Attorney, United States Department of Health, Education and Welfare,
Defendants.

Order Extending Temporary Restraining Order

(Filed July 22, 1967)

It is ORDERED that the temporary restraining order made and entered herein on the 14th day of July, 1967, be and the same is hereby extended, and will remain in full force and effect as issued, unless otherwise ordered, until the 3rd day of August, 1967.

This order is made by and with the concurrence of each member of this Court.

Done, this the 22nd day of July, 1967.

/s/ Frank M. Johnson, Jr.
United States District Judge

APPENDIX 23

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE ET AL.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION ET AL., JOHN D. GARDNER, as Secretary of Health, Education and Welfare of the United States; F. PETER LIBASSI, United States Commissioner of Education, and JAMES R. DUNN, Attorney, United States Department of Health, Education and Welfare,
Defendants.

Order

(Filed July 26, 1967)

The order of this Court made and entered herein on July 14, 1967, adding parties defendant, is ORDERED to be and the same is hereby amended to reflect that F. Peter Libassi is made a defendant in this cause as Special Assistant to the Secretary of Health, Education and Welfare for Civil Rights and Director of the Office for Civil Rights of Health, Education and Welfare, rather than as United States Commissioner of Education.

Done, this the 26th day of July, 1967.

/s/ Frank M. Johnson, Jr.
United States District Judge

APPENDIX 24

Nos. 17118 and 17119

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENDA K. MONROE ET AL.,
Plaintiffs-Appellants,

vs.

BOARD OF COMMISSIONERS, CITY OF JACKSON, TENNESSEE ET AL., and COUNTY BOARD OF EDUCATION, MADISON COUNTY, TENNESSEE ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Tennessee
Decided July 21, 1967.

Before: O'Sullivan, Phillips and Peck, Circuit Judges.

O'Sullivan, Circuit Judge. In 1963 a suit was filed by Brenda K. Monroe and others, Negro children and their parents, to bring about the desegregation of the public schools of the City of Jackson and of Madison County, Tennessee.[1]

The District Court required the school authorities to submit plans to accomplish desegregation and ulimately granted the relief sought by approving parts of a submitted plan and ordering other steps to be taken. Separate opinions were written, one involving the City of Jackson schools, reported as *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee, et al.*, 221 F. Supp. 968 (W.D. Tenn. E.D. 1963) and the other relating to Madison

1. The City of Jackson is located in Madison County and the respective school authorities are the Board of Commissioners of the City of Jackson and the County Board of Education of Madison County.

County Schools, reported in *Monroe* v. *Board of Commissioners, etc., et al.*, 229 F. Supp. 580 (W.D. Tenn. E.D. 1964). Appeals to this Court from these cases were dismissed by agreement. Obedient to the above decisions, all grades of the schools involved have been desegregated.

The litigation with which we now deal arises from Motions for Further Relief filed in the District Court by plaintiffs. By these motions, plaintiffs sought to accomplish greater integration of the school children, desegregation of the teaching staffs, and the enjoining of described practices of the school authorities which were alleged to be violative of the District Judge's original decrees and contrary to new developments in the law. The District Judge, again, dealt separately with the city and the county schools in disposing of the Motions for Further Relief. His decision as to the city schools is reported in *Monroe* v. *Board of Commissioners, City of Jackson*, 244 F. Supp. 353 (W.D. Tenn. E.D. July 30, 1965) and as to the County schools in *Monroe* v. *Board of Education, Madison County, Tennessee, et al.*, ... F. Supp. ..... (W.D. Tenn. E.D. August 2, 1965). These are the cases before us on this appeal; the plaintiffs are the appellants. These opinions, with the earlier ones reported at 221 F. Supp. 968 and 229 F. Supp. 580. *Supra;* set out the facts and we will restate them only where needed to discuss the present contentions of the plaintiffs-appellants.

1) COMPULSORY INTEGRATION.

Appellants argue that the courts must now, by reconsidering the implications of the *Brown* v. *Board of Education* decisions in 347 U.S. 483 (1954) and 349 U.S. 294 (1955), and upon their own evaluation of the commands of the Fourteenth Amendment, require school authorities to take affirmative steps to eradicate that racial imbalance in their schools which is the product of the residential pat-

tern of the Negro and white neighborhoods. The District Judge's opinion discusses pertinent authorities and concludes that the Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan. We agree with his conclusion. We have so recently expressed our like view in *Tina Deal, et al.* v. *The Cincinnati Board of Education*, 369 F.(2) 55 (CA 6, 1966), petition for cert. filed, 35 LW 3394 (U.S. May 5, 1967) (No. 1358), that we will not here repeat Chief Judge Weick's careful exposition of the relevant law of this and other circuits. He concluded "We read *Brown* as prohibiting only enforced segregation." 369 F(2) at 60. We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long before *Brown*, whereas we consider here Tennessee schools desegregated only after and in obedience to *Brown*. We are not persuaded, however, that we should devise a mathematical rule that will impose a different and more stringent duty upon states which, prior to Brown, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation—this to be true even though the current problem be the same in each state.

We are asked to follow *United States* v. *Jefferson County Board of Education*, 372 F(2) 836 (CA 5, 1966) which seems to hold that the pre-Brown biracial states must obey a different rule than those which desegregated earlier or never did segregate. This decision decrees a dramatic writ calling for mandatory and immediate integration. In so doing, it distinguished *Bell* v. *School City of Gary, Indiana*, 324 F(2) 209 (CA 7, 1963), cert. den. 377 U.S. 924, on the ground that no pre-Brown de jure segregation had existed in the City of Gary, Indiana. 372 F.2d at

873. It would probably find like distinction in our *Tina Deal* decision because of Cincinnati's long ago desegregation of its schools. We, however, have applied the rule of *Tina Deal* to the schools of Tennessee. In *Mapp* v. *Board of Education*, 373 F(2) 75, 78 (CA 6, 1967) Judge Weick said,

> "To the extent that plaintiffs' contention is based on the assumption that the School Board is under a constitutional duty to balance the races in the school system in conformity with some mathematical formula, it is in conflict with our recent decision in *Deal* v. *Cincinnati Board of Education*, 369 F(2) 55 (6th Circ. 1966)."

However ugly and evil the biracial school systems appear in contemporary thinking, they were, as *Jefferson, supra*, concedes, de jure and were once found lawful in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by *Brown* would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures of the states and the nation—U.S. Const. Art. I, Section 9, Clause 3 and Section 10, Clause 1. Neither, in our view, would such decrees comport with our current views of equal treatment before the law.

This is not to say that Tennessee school authorities can dishonestly construct or deliberately contrive a system for the purpose of perpetuating a "maximum amount" of its pre-Brown segregation. *Northcross* v. *Board of Education of City of Memphis*, 33 F(2) 661, 664 (CA 6, 1964). But to the extent that *United States* v. *Jefferson County Board of Education*, and the decisions reviewed therein, are factually analogous and express a rule of law contrary

to our view herein and in *Deal*, we respectfully decline to follow them.

2) GERRYMANDERING.

Appellants assert that while giving surface obedience to the establishment of a unitary zoning system and freedom of choice, the school officials of the City of Jackson had been guilty of "gerrymandering" in order "to preserve a maximum amount of segregation." Were this true, it would be violative of the law. *Northcross* v. *Board of Education of City of Memphis*, 302 F(2) 818, 823 (CA 6, 1962), cert. den. 370 U.S. 944, and *Northcross* v. *Board of Education of City of Memphis*, 333 F(2) 661, 664 (CA 6, 1964). The District Judge in the instant matter did hold that as to some boundary lines "there appears to be gerrymandering." *Monroe* v. *Board of Commissioners, City of Jackson*, *supra*, 244 F. Supp. at 361. As to these instances, he ordered changes in the school zone lines. *Id.* at 361, 362. But, as to the junior high schools, he concluded,

> "that the proposed junior high school zones proposed by defendants do not amount to gerrymandering." 244 F. Supp. at 362.

Without making our own recitation of the relevant evidence, we express our agreement with the District Judge.

3) FACULTY DESEGREGATION.

In the accomplishment of desegregation in the involved schools, there remain some that are attended only by Negro and other only by white children. The teaching staff conforms substantially to this pattern—all Negro teachers in the all Negro schools and all white teachers in the all white schools. Little attention was paid to the teaching staff in the early desegregation cases. *Brown* v. *Board of Education*, *supra*, did not speak on it, nor did the early relevant decisions from this circuit. In *Mapp* v. *Board of*

Education of Chattanooga, 319 F(2) 571, 576 (CA 6, 1963), however, we ordered restored to the complaint there involved allegations and prayers for relief relating to assignment of teachers and principals, but ordered also that "decision of the legal question presented await development of the progress of the plan approved." 319 F(2) at 576. And we further concluded that "within his discretion, the District Judge may determine when, if at all, it becomes necessary to give consideration to the question. . . ." Ibid.

This leisurely postponement of consideration of faculty desegregation appealed to the Fourth Circuit, when in *Bradley* v. *School Board of City of Richmond, Virginia*, 345 F(2) 310, 320, 321 (CA 4, 1965), it said:

> "The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need not be determined when it is speculative. When all direct discrimination in the assignment of pupils has been eliminated, assignment of teachers may be expected to follow the racial patterns established in the schools. An earlier judicial requirement of general reassignment of all teaching and administrative personnel need not be considered until the possible detrimental effects of such an order upon the administration of the schools and the efficiency of their staffs can be appraised along with the need for such an order in aid of protection of the constitutional rights of pupils."

But the Supreme Court declared this would not do, and in *Bradley* v. *School Board*, 382 U.S. 103 (1965), remanded the case to require the Richmond School Board to proceed with study and resolution of the faculty integration question, stating,

> "There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative." 382 U.S. at 105.

The *Bradley* opinion was followed by *Rogers* v. *Paul, et al.*, 382 U.S. 198 (1965); once again the Supreme Court remanded the cause for consideration of the faculty desegregation problem.

The District Judge in the matter now before us did hear some evidence on the question of faculty desegregation and concluded,

> "We do not believe that the proof of the plaintiffs is sufficiently strong to entitle them to an order requiring integration of the faculties and principals." 244 F. Supp. at 364.

He did, however, attack a then current policy of the school authorities whereby white teachers and Negro teachers, "simply because of their race," were respectively assigned only to schools whose pupils were all or predominantly of that teacher's race. The order implementing his decision contained the following:

> "The application of plaintiffs for an order requiring integration of faculty is at this time denied. However, the policy of defendants of assigning white teachers only to schools in which the pupils are all or predominantly white and Negro teachers only to schools in which the pupils are all Negro is by this order rescinded to the extent that white teachers, who so desire, will not be barred from teaching in schools in which the pupils are all or predominantly Negro, and Negro teachers, who so desire, will not be barred from teaching in schools in which the pupils are all or predominantly white.
>
> To implement this change in policy, defendants must forthwith, as to substitute teachers, and each year beginning with the year 1966-67, as to all teachers, publicize it and obtain from each teacher an indication of willingness or an indication of objection to teaching in a school in which the pupils are all or predominantly of the other race. All teachers who indicate such a

willingness will be assigned to schools without consideration of the teacher or the pupils, but all other usual factors may be considered in assigning teachers. Nothing in this order, however, will be construed as requiring the assignment of an objecting teacher to a school in which the pupils are all or predominantly of the other race or will be construed as requiring a refusal to employ or a dismissal of a teacher who objects to teaching in such a school. This change in policy will be effective as to substitute teachers during the remainder of the school year 1965-66 and as to teachers beginning with the school year 1966-67."

We note that this order was handed down before *Bradley* v. *School Bd.*, *supra*, and we are constrained to hold that it does not commit or require the school authorities to adopt an adequate program of faculty desegregation which will pass muster under the implied command of the *Bradley* case. Whatever Bradley's clear language, we cannot read it otherwise than as forbidding laissez faire handling of faculty desegregation. It implies that the accomplishment of that goal cannot be left to the free choice of the teachers and that the Board must exercise its authority in making faculty assignments so as to assist in bringing to fruition the predicted benefits of school desegregation.

No Supreme Court decision, however, has as yet provided a blue print that will achieve faculty desegregation. The United States Office of Education has indicated that, in some affirmative way, school boards must act to correct past discriminatory practices in the assignment of teachers.[2] But its recommendations do not have the force

2. "§ 181.13 Faculty and Staff

(a) *Desegregation of Staff.* The racial composition of the professional staff of a school system, and of the schools in the system, must be considered in determining whether students are subjected to discrimination in educational programs. Each school system is responsible for correcting the effects of all past discriminatory practices in the assignment of teachers and other professional staff.

of law; neither does it provide clear guidelines to make easy the job of school boards in dealing with this problem. It will be difficult to eliminate the forcing of people into places and positions because of race and at the same time compulsorily assign a school teacher on the basis of his or her race.

It is sufficient for us to say now that the formula announced by the District Judge, leaving the decision of integration of the faculties to the voluntary choice of the teachers, does not obey current judicial commands. We, therefore, remand this phase of the litigation to the District Judge to reconsider upon a further evidentiary hearing the matter of faculty desegregation.

(b) *New assignments.* Race, color, or national origin may not be a factor in the hiring or assignment to schools or within schools of teachers and other professional staff, including student teachers and staff serving two or more schools, except to correct the effects of past discriminatory assignments.

* * *

(d) *Past assignments.* The pattern of assignment of teachers and other professional staff among the various schools of a system may not be such that schools are identifiable as intended for students of a particular race, color, or national origin, or such that teachers or other professional staff of a particular race are concentrated in those schools where all, or the majority, of the students are of that race. Each school system has a positive duty to make staff assignments and reassignments necessary to eliminate past discriminatory assignment patterns. Staff desegregation for the 1966-67 school year must include significant progress beyond what was accomplished for the 1965-66 school year in the desegregation of teachers assigned to schools on a regular full-time basis. Patterns of staff assignment to initiate staff desegregation might include, for example: (1) Some desegregation of professional staff in each school in the system, (2) the assignment of a significant portion of the professional staff of each race to particular schools in the system where their race is a minority and where special staff training programs are established to help with the process of staff desegregation, (3) the assignment of a significant portion of the staff on a desegregated basis to those schools in which the student body is desegregated, (4) the reassignment of the staff, of schools being closed to other schools in the system where their race is a minority, or (5) an alternative pattern of assignment which will make comparable progress in bringing about staff desegregation successfully.

4) DESEGREGATION OF TEACHERS' ORGANIZATIONS.

It appears that at the time of the hearing in the District Court there existed in Tennessee two voluntary organizations, the Tennessee Education Association, whose membership was confined to white teachers, and the Tennessee Education Congress, made up of Negro teachers. Traditionally, the School Board allowed separate holidays to permit the members of these organizations to attend so-called "teacher in-training" programs. The District Judge dealt with this subject as follows:

> "Plaintiffs also seek an order prohibiting segregation of teacher in-service training. Although the proof is not completely clear, it appears that the only such segregation that remains results from the fact that the white teachers and the Negro teachers are members of separate professional organizations. It appears without dispute that defendants do not control the policies of these organizations. In any event, as heretofore indicated, the Mapp case, supra, holds that plaintiffs have no standing to assert any constitutional claims that the teachers may have and may assert a claim for teacher desegregation only in support of their constitutional right, as pupils, to an abolition of discrimination based on race. The assertion by plaintiffs that what remains of segregation in teacher in-service training has an effect on their right as pupils is, on the proof in this case extremely tenuous. We deny this application for relief." 244 F. Supp. at 365.

The evidence on this subject is too meager to permit us to evaluate the extent to which the school authorities participated in or aided the activities of these separate teacher organizations, and the degree to which membership by the teachers in them would, in turn, affect the rights of the pupils. It appears, however, that these in-service training programs for teachers are conducted pursuant to

state law, and are financed with public funds.[3] We make clear that the plaintiff pupils do have standing to assert that the existence of separate teacher organizations based on race and the school authorities' cooperation with their separated activities such as the in-training program "impairs the students' rights to an education free from any consideration of race." *Mapp* v. *Board, supra,* 319 F(2) at 576. If the District Judge's above quoted language can be read as a contrary holding, it is error. We also remand this issue to the District Judge for further consideration.

5) THE JACKSON SYMPHONY ORCHESTRA.

It appeared that the Jackson Symphony Association, with permission of the school authorities, arranged for a program by the Jackson Symphony Orchestra at one of the Jackson schools. The ladies in charge of this event invited the children in several grades of the Jackson City Schools, the County schools, and the Catholic schools. Those students included some from the all-white schools, and some from the schools, public and parochial, containing both Negro and white students. Students in all-Negro schools were not invited for the two performances involved. Testimony by one of the ladies of the Symphony Association denied any discriminatory motivation in the selection of the pupils, suggesting that the capacity of the auditorium was exhausted by those invited and in attendance. She said,

> "If we had room, we would have had every child in town there—fourth, fifth and sixth grades of every school, but we didn't have room."

The school authorities had nothing to do with the matter of who was to be chosen to attend the concert. Its only

3. See e.g., Chap. 76, Tenn. Public Acts, 1965, Sec. 24.

participation was to allow the use of the auditorium. While it would be impermissible for school authorities to allow use of school facilities for entertainment that was discriminatory, nothing was developed by the evidence to cause us to criticize the District Judge's conclusion that the "defendants were not motivated by racial considerations" in their handling of this matter. *Monroe* v. *Board of Commissioners, supra,* 244 F. Supp. at 365.

Another issue discussed by the District Judge ..... F. Supp. at ....., the so-called "split season," has been rendered moot by the elimination of the practice.

The cause is remanded to the District Judge for further consideration of the matter of faculty desegregation and teacher in-service training, and is otherwise affirmed.

APPENDIX 25

The Tuition Grant Law (Title 52, #61 (8); Code of Alabama) Passed by the Legislature of the State of Alabama and Approved by the Governor on September 1, 1965.

When child may not be compelled to attend school; objection and request for transfer and reassignment; tuition grants for attendance at private non-sectarian institutions.—Any other provisions of law notwithstanding, no child shall be compelled to attend any school when in the judgment of the parent or guardian of such child attendance in the school to which assigned will be detrimental to the physical or emotional health of such child or subject the child to hazards to personal safety. In any such case, the parent or guardian of such child shall file written objections with the local board of education and request transfer and reassignment. Upon refusal of any board to grant such a request, the child shall proceed as provided in section 61 (7) of this title, or in lieu thereof, submit an application to the state board of education for a tuition grant to attend any private nonsectarian school in or outside the school attendance district in which the child resides.. Tuition grants approved by the state board shall not exceed a total of one hundred eighty-five dollars ($185.00) in any one school years, or a sum to be determined by the state superintendent of education to be the cost per pupil in average daily attendance in the public schools of the state, whichever sum shall be less. The state board of education shall promulgate rules and regulations for the administration of tuition grants which shall be paid only from funds appropriated by the legislature for such purpose. It shall be unlawful for any person to use funds granted under this chapter for any purpose other than for

the payment of tuition in school; and whoever violates this provision is guilty of a misdemeanor and upon conviction shall be punished as prescribed by law. As a condition precedent to the receipt of a tuition grant under this chapter, the state board of education shall cause the parent or guardian of any child to whom a grant is made to enter into an enforceable agreement to reimburse the state board of education for the full amount of any grant made hereunder in the event of the enrollment of such child or children in any public school of this state after the receipt of a grant and within the school year for which the grant was made.

APPENDIX 26

Docket No. 40292—Agenda 23—March, 1967

James Tometa *et al.*, Appellees, v. Board of Education, Waukegan City School District No. 61 *et al.*, Appellants.

Mr. Justice House delivered the opinion of the court:

Section 10—21.3 of the Illinois School Code, (Ill. Rev. Stat. 1965, chap. 122, par. 10—21.3) commonly called the Armstrong Act, provides in part: "As soon as practicable, and from time to time thereafter, the board shall change or revise existing units or create new units in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race or nationality." Sections 10—20.11, 34—18(7) and 34—22 of the Code have a provision similar to the quoted provision.

The principal question presented by this appeal is whether the provision requires school boards to prevent and eliminate "*de facto* segregation" or "racial imbalance" and whether such a requirement violates the equal protection clause of the fourteenth amendment and section 22 of article IV of our constitution.

On August 4, 1965, seven minor children, by their respective parents, instituted this action alleging that the Waukegan City School District had violated the Armstrong Act and prayed for a mandatory injunction requiring the district to revise attendance units and naming the district and its board of education as defendants. Plaintiffs are students in the Whittier attendance unit. When this action

was commenced the percentage of Caucasians and Negroes in Whittier and adjacent attendance units was as follows:

Name of School	*Percentage of Caucasians*	*Percentage of Negroes*
Whittier	15%	85%
Clearview	100%	0%
Glen Flora	98%	2%
Glenwood	100%	0%
Hyde Park	100%	0%

After this action was filed, Dr. McCall, superintendent of the school district was requested by the board to make a study of attendance units in the Whittier area and other attendance units. He prepared a report consisting of 47 pages of text, statistical sheets and overlay maps showing alternative plans for boundary changes. The report presents four different boundary plans for the Whittier area, called plans 1, 2, 3 and 4. It discusses the plans in terms of overcrowding, distance from home to school, traffic conditions and elimination of separation of children on account of color, race or nationality. The report, which recommended that no change be made in any of the boundaries, was submitted in May, 1966. On June 13, 1966, the board approved the report and voted to make no change in attendance unit boundaries.

At the trial of the cause, plaintiffs stipulated and the court in its decree, entered on July 20, 1966, found that the racial imbalance in the Whittier area was not created by deliberate intent on the part of the defendants and there has been no intentional racial discrimination by the defendants. The court also found that the board maintained the existing attendance unit boundaries because of considerations of traffic hazards, walking distances, finances and classroom capacities, but also found that these considerations are of a minor nature as compared to the marked racial imbalance.

The court held that the Armstrong Act is constitutional and that it applied to "so-called *de facto* segregation in schools, i.e. racial imbalance in schools not created by the deliberate intent of a school board." It also held that school boards have a duty to correct racial imbalance as soon as practicable, and since there are no other specific directives in the Act concerning traffic hazards or other factors, racial imbalance is the paramount consideration. The court ordered defendants to file, on or before August 1, 1966, a plan ameliorating racial imbalance in the Whittier area and set a hearing for August 4, 1966, to consider the plan.

On August 4, 1966, the court incorporated in its decree plan 2 of the McCall Report with certain modifications. Under the court's decree, the distribution of Caucasian and Negro children in the Whittier and surrounding attendance units is as follows:

Name of School	*Percentage of Caucasians*	*Percentage of Negroes*
Whittier	57.4%	42.6%
Clearview	100%	0%
Glen Flora	83.0%	17.0%
Glenwood	83.6%	16.4%
Hyde Park	79.9%	20.1%

Defendants first argue that the Armstrong Act applies to *de jure* segregation and not to *de facto* segregation. The cases and commentators use the term "*de jure* segregation" to describe the seperation of Negro and white children by governmental action. They use the terms "*de facto* segregation" and "racial imbalance" synonymously to refer to the situation where a school is composed predominantly of Negro students but not as a result of any State, municipal or other governmental action or policy.

Illinois has never been classified as a *de jure* segregation State. As early as 1874, this court ruled that school directors could not separate students on the basis of race or color. (*Chase* v. *Stephenson*, 71 Ill. 383; see also *People ex rel. Longress* v. *Board of Education of The City of Quincy*, 101 Ill. 308; *People ex rel. Peair* v. *Board of Education of Upper Alton School Dist.*, 127 Ill. 613; *People ex rel. Bibb* v. *Mayor and Common Council of Alton*, 193 Ill. 309.) Later that same year, the legislature prohibited school officials from excluding any child on account of color. (Hurd, Rev. Stat. 1874, chap. 122, par. 100.) Such a prohibition has always been in our school law and is now contained in section 10—22.5 of the School Code. (Ill. Rev. Stat. 1965, chap. 122, par. 10—22.5.) In 1954 *de jure* segregation by any State was held to violate the Federal constitution. (*Brown* v. *Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686.) It seems inconceivable that our legislature would, in 1963, pass an act to just prohibit *de jure* segregation. The battle to eliminate *de jure* segregation in all States had been won in 1954 and by 1963 the struggle to eliminate *de facto* segregation was in full force. As will be noted later, numerous cases attacking racial imbalance had already reached the courts and a few States had already enacted legislation on the subject.

Defendants point out, nevertheless, that the Armstrong Act requires "elimination of separation of children in public schools because of color," but the record is clear that children in Waukegan were not separated because of color. We agree with the trial judge's interpretation that "separation because of color" is intended to be descriptive of a condition and not definitive of the origin of the condition.

We hold that the apparent purpose of the Armstrong Act is that school boards shall as soon as practicable eliminate racial imbalance.

This brings us to the constitutionality of the Armstrong Act. The opening statements of the Supreme Court in *Brown* v. *Board of Education*, 349 U.S. 294, 99 L. Ed. 1083, 75 S. Ct. 753, (Brown II) were "These cases were decided on May 17, 1954. The opinions of that date, [cited in footnote] (*Brown* v. *Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686; *Bolling* v. *Sharpe*, 347 U.S. 497, 98. L. Ed. 884, 74 S. Ct. 693,) declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle." In the third paragraph of the opinion the court mentions "a system of public education freed of racial discrimination" and "steps to eliminate racial discrimination in public schools."

Racial discrimination is, of course, the act of making distinctions based on race. A reading of *Brown* II indicates that the principle announced in *Brown* I was that a distinction or classification based on race is arbitrary, capricious and unreasonable. It would seem to follow that any law containing a racial classification is arbitrary and unreasonable and violates the equal-protection clause of the fourteenth amendment.

There are, however, numerous cases arising after the *Brown* decisions in which it has been asserted and considerable discussion given to the question of whether racial classification should be permitted by school boards to eliminate racial imbalance. While the cases are not entirely harmonious, the prevailing view seems to be that the fourteenth amendment does not require integration or elimination of racial imbalance unless such racial imbalance is the result of governmental action. It has been held, for example, that a board of education has no duty under the equal-protection clause of the fourteenth amendment to

eliminate racial imbalance that it did not cause. (*Bell* v. *School City of Gary, Indiana,* (7th cir. 1963) 324 F.2d 209, *cert.* denied 377 U.S. 924, 12 L. Ed. 2d 216, 84 S. Ct. 1223; *Downs* v. *Board of Education of Kansas City,* (10th cir. 1964) 336 F.2d 988, *cert.* denied 380 U.S. 914, 13 L. Ed. 2d 800, 85 S. Ct. 898; *Deal* v. *Cincinnati Board of Education,* (6th cir. 1966) 369 F.2d 55.) On the other hand, it has been held that "the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system wide policy of integration." *United States* v. *Jefferson County Board of Education,* (5th cir. 1966) 372 F.2d 836, 369; *Dowell* v. *School Board of Oklahoma City Public Schools,* (U.S. Dist. Ct. W.D. Okla.), 244 F. Supp. 971; *Wanner* v. *County School Board of Arlington County,* (4th cir. 1966) 357 F.2d 452.

Plaintiffs are quick to point out that the issue here, as contrasted with the cases above cited, is not whether the fourteenth amendment *requires* State authorities to correct racial imbalance in its schools. Rather, they assert, the question is whether the fourteenth amendment *prohibits* State authorities from correcting racial imbalance.

Voluntary action by State authorities to eliminate racial imbalance has been approved in New York (*Addabbo* v. *Donovan,* 16 N.Y.2d 619, 209 N.E.2d 112, *cert.* denied 382 U.S. 905, 15 L. Ed. 2d 158, 86 S. Ct. 241; *Vetere* v. *Allen,* 15 N.Y.2d 259, 206 N.E.2d 174), California (*Jackson* v. *Pasadena City School District,* 59 Cal.2d 876, [illegible] P.2d 878), New Jersey (*Booker* v. *Board of Education of Plainfield,* 45 N.J. 161, 212 A.2d 1), and Connecticut (*Guida* v. *Board of Education of City of New Haven,* 26 Conn. Supp. 121, 213 A.2d 843). The basic approach of these cases is that school authorities have a duty to provide equal educational opportunities and that when the school authorities have determined that the elimination of racial imbalance will pro-

mote equal educational opportunities, their action, if reasonable, will be sustained.

The Armstrong Act has the effect of ordering school boards to enter the field of racial classification. In 1874, this court ruled that "The free schools of the State are public institutions, and in their management and control the law contemplates that they should be so managed that all children within the district * * * regardless of race or color, shall have equal and the same right to participate in the benefits to be derived therefrom. While the directors, very properly, have large and discretionary powers in regard to the management and control of schools, in order to increase their usefulness, *they have no power to make class distinctions* * * *." (Emphasis added.) (*Chase* v. *Stephenson*, 71 Ill. 383, 385.) Thus, from 1874 until the passage of the Armstrong Act there has been no doubt that school authorities in this State had no power to make class distinctions.

During this same period the fourteenth amendment has been construed as not prohibiting school authorities from making racial classifications (*Plessy* v. *Ferguson*, 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138), and then as prohibiting school authorities from making racial classifications. (*Brown* v. *Board of Education*, 349 U.S. 294, 99 L. Ed. 1083, 75 S. Ct. 754.) As we have indicated several States have again entered the field of racial classification in education albeit for what they now consider a proper governmental goal. As one commentator has pointed out, "This is exactly what the plaintiffs' attorneys urged the Supreme Court to prohibit in the *Brown* case, and for good reason. Although today a court might rule that the state is required to consider race in a benign way, tomorrow this might well prove a precedent for a much less happy result. Moreover, even today it is not easy to decide whether a given racial classification is benign." Kaplan, Segregation Litigation and the

Schools—Part II: The General Northern Problem, 58 Nw. U.L. Rev. 157, 188 (1963).

Unfortunately the battle for equal educational opportunity is being fought as a racial one. This tends to generate heat rather than light. Even the strongest exponents for elimination of racial imbalance in the schools recognize and admit that denial of equal educational opportunity is not limited to the Negroes. (See *e.g.*, Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564 (1963).) We hold that programs to create equal educational opportunities must under the equal-protection clause of the fourteenth amendment (*Brown* v. *Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686) and under section 22 of article IV of our constitution be administered without regard to race. *Chase* v. *Stephenson*, 71 Ill. 383.

Several commentators have recognized the desirability of employing our traditional concept of general laws without regard to race to reach the problems of the disadvantaged in general, and Negroes in particular. For example, Professor Freund has stated, "Is not the constitution color blind? Can a preferential treatment of Negroes be squared with the requirement of equal protection of the laws? Is it not an unconstitutional discrimination in reverse? A head on clash of principle can be averted, in most cases wisely in my judgment, by framing programs of aid in terms of reaching the most disadvantaged segment of the community, whether economically, educationally, or politically. And if these happen to be in fact predominantly Negroes, no principal of race-creed classification has been violated." (Freund, Civil Rights and the Limits of Law, 14 Buffalo L. Rev. 199, 204 (1964).) The Anti-Poverty Programs of the Federal government and our Public Aid Programs are good examples of the point.

We have chosen to go to the heart of the basic constitutional issue raised by legislation based on racial classifications. There are, nevertheless, several other questionable features about the Armstrong Act. It is well established, of course, that an act of the legislature must be sufficiently explicit to advise everyone what his rights are under it and how he will be affected by its operation. (*People ex rel. Schoon* v. *Carpentier*, 2 Ill.2d 468.) Here we have an act directing school boards to change attendance units in order "to prevent segregation" and "eliminate separation" of children of different color, race and nationality.

While the Act does not use the terms "racial imbalance" or "*de facto* segregation" we feel that the purpose of the Act is to eliminate racial imbalance. This raises a question of when a school is racially imbalanced. Here, the trial judge felt Whittier was racially imbalanced when it had 85% Negroes and was not when it had 42.6% Negroes. But the legislature has not indicated to the school boards what constitutes a racially imbalanced school.

Under this Act the school board must also determine race or color for the first time. School boards would not get much aid from either the natural or social scientists. Approximately three fourths of those whom our culture defines as Negroes have some white ancestry and many Negroes are biologically more than half white. (Kaplan, Segregation Litigation and the Schools—Part II: The General Northern Problem, 58 Nw. U.L. Rev. 157, 199.) One writer has commented: "We are, of course, not without statutory and judicial guides in this area. States with segregated public school systems have had long experience in deciding who is 'White' and who is 'Negro', and anti-miscegenation laws provide us with ample and exquisite, though often conflicting, categories. We could even take

our principles of taxonomy from Hitler's Germany or today's South Africa, on the theory that its principles are being turned to a good use * * *. Whether we use domestic or imported standards, and whether we rely on genealogical records, physical traits, or reputation, however, the determination of an individual's race in a disputed case is dirty business, and I would keep all branches of government out of it whenever possible." (Bittker, The Case of the Checker-Board Ordinance: An Experiment in Race Relations, 71 Yale L.J. 1387, 1421-22.) It goes without saying that determination of nationality, which is also covered by the Act, presents an even more difficult problem for the school board.

Probably the greatest uncertainty created by the Act is its effect on the traditional and universally used neighborhood-school concept. The Act directs school boards to change attendance units, taking into consideration "the prevention of segregation" and "elimination of separation" of children of different color, race and nationality. The Act does not mention considerations of room capacity, distance from home to school, traffic hazards or any other relevant factors. Whether racial imbalance is just one factor to be considered with these traditionally relevant factors, as in *Balaban* v. *Rubin*, 14 N.Y.2d 193, 199 N.E.2d 375; or whether it is the "paramount" consideration, as the trial judge held; or whether it is the only consideration, as the Act indicates, creates a distinct uncertainty for school boards.

As we have stated, it is unfortunate that the battle for equal educational opportunity is being fought as a racial one. Here, for example, the Whittier area was integrated without any finding that such action would produce equal educational opportunity and under an Act which has not made such a determination.

In those few States where action against racially imbalanced schools has been sustained, it has been done on the ground that it was for equality of educational opportunity. For example, in *Vetere* v. *Allen*, 15 N.Y.2d 259, which involved a determination of the commissioner of education directing a school board to reorganize attendance areas in a school district, the court stated, "Here the Board of Regents under authority of section 207 of the Education Law has declared racially imbalanced schools to be educationally inadequate. The Commissioner under sections 301 and 305 of the Education Law has implemented this policy by directing local boards to take steps to eliminate racial imbalance. These administrative decisions are final absent a showing of pure arbitrariness."

If the purpose of the Armstrong Act is to eliminate racial imbalance, it would apepar to be for integration qua integration without any determination that it would promote equal educational opportunities. As the trial judge pointed out, the Act does not mention factors such as traffic hazards, distance from home to school or overcrowding to be considered along with racial imbalance in fixing attendance unit lines. He concluded that elimination of racial imbalance is mandatory and the paramount consideration. Apparently the trial judge and the plaintiffs were aware that the legislature had not made a determination that elimination of racial imbalance will promote equal educational opportunities. Plaintiffs produced expert witnesses who testified that racial imbalance impairs educational opportunity and the trial judge made a finding that racial imbalance can result in educational disadvantage (not that it did in this case), a finding that would be unnecessary if the legislature had made it when passing the Armstrong Act. The difference, in short, is that New York approached the problem as an educational one whereas our legislature approached it as a social problem.

It was the trial court, and not the legislature, who attempted to tie the social aspect to the educational aspect. Where the legislature has passed an act which it deems socially desirable, the courts should not, as did the trial court here, determine that it will improve educational opportunity. This is a matter for the legislature. Aside from the fact that the trial court should not make a legislative determination, we note parenthetically that a strong argument can be made for the position that the action of a trial court in changing the attendance units may have an adverse effect on the goal of obtaining equal educational opportunities. See Kaplan, Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment, 61 Nw. U.L. Rev. 363, 403 (1966).

The dissent to this opinion asserts that we have declared the Armstrong Act unconstitutional because we found the General Assembly was motivated by an improper purpose. This is simply not true and is actually completely contrary to our holding. Our holding is that programs to create equal educational opportunities must under the equal protection clause of the fourteenth amendment and under section 22 of Article IV of our constitution be administered without regard to race. This is the *neutral* application of the statement in *Brown* II—"the fundamental principle [is] that racial discrimination in public education is unconstitutional." Just as the neutral principle of free speech protects speech which may or may not be socially desirable, so also does the principle prohibiting racial discrimination in public education prevent this type of legislation regardless of the General Assembly's purpose.

After applying the "fundamental principal that racial discrimination in public education is unconstitutional" *regardless of its apparent purpose,* we pointed out that the Act was not sufficiently explicit in defining what the

school board's duty is under the Act. Finally we stated that the trial court's finding that racial imbalance can result in educational disadvantage [not that it did in this case] constituted a legislative determination. Ironically in view of the dissent, it was the trial court who inquired into the motives of the legislature in an effort to uphold the Armstrong Act.

We hold that the Armstrong Act is unconstitutional. The judgment of the circuit court of Lake County is accordingly reversed.

Judgment reversed.

Mr. Justice Schaefer, dissenting:

I am not able to concur in the unique approach to the constitutionality of legislation which the majority has adopted in this case. The majority assumes that two purposes might have motivated the action of the legislature. It apparently determines that one of these purposes would sustain the validity of the act and the other would not. It then decides that the General Assembly was motivated by the improper purpose, saying: "We find that the purpose of the Armstrong Act is probably to eliminate racial imbalance. It would appear that this was done for integration qua integration without any determination that it would promote equal education opportunity." And after pointing out "that New York approached the problem as an educational one whereas our legislature approached it as a social problem", the opinion continues: "Where the legislature has passed an act which it deems socially desirable, the courts should not, as did the trial court here, determine that it will improve educational opportunity. This is a matter for the legislature."

The majority cites no authority to support its novel approach, and I am aware of none. Hundreds of judicial

decisions have asserted that a court may not inquire into the motives of a legislative body. "It is a well known rule of law that the knowledge and good faith of a legislature are not open to question and its motives cannot be inquired into. Courts must always assume that the legislative discretion has been properly exercised." (*Murphy* v. *Chicago, Rock Island and Pacific Railway Co.*, 247 Ill. 614, 619.) It is unnecessary to multiply citations.

This restraint stems from the sensitive nature of the doctrine of judicial review. "When the validity of an act of the legislative department has been in question, the constant rule has been to construe it so as to uphold its validity if it could reasonably be done, and if its construction was doubtful the doubt was resolved in favor of the law. * * * The issue in such a case is between the people and their agents, and the question is whether the agents have exceeded the letter of their authority. It has been repeatedly said that the power of this court in determining the constitutionality of laws is limited to whether an act was within the scope of the powers of the legislative department, and that the discretion reposed in the legislature cannot be reviewed. The following principles have been laid down and consistently adhered to: The legislature is the guardian of the public interest and welfare and is the sole judge of such measures as may advance the interests of the people. * * * Whether a statute is a wise one is a question with which the court has no concern. * * * The courts cannot inquire into the motives which may have moved the legislature to enact a statute. Such motives will be presumed to be patriotic. * * * The courts cannot investigate the motives of the legislature, but must presume that it acted in good faith and for the best interest of the State." *People ex rel. Bruce* v. *Dunne*, 258 Ill. 441, 453-4.

No legislative finding of fact is required to trigger the presumption of the validity of legislation, although the ma-

jority, without the citation of authority, seems to assert such a requirement. The trial judge properly heard expert testimony as to the effect of school segregation upon equality of educational opportunity (see cases collected, anno. 82 L. Ed. 1244) and found: "School segregation can result in educational disadvantage to students of minority races, regardless of whether such segregation occurs as a result of deliberate policy or merely results from other considerations."

And with respect to other factors relevant to the fixing of the boundaries of attendance units, the trial judge expressed the opinion that "defendants' evidence concerning traffic, distances of students from school, finances and classroom capacity are not determinative of the issues in the case at bar. In making this statement, the court does not mean to intimate that in a given case these factors could not be the determining factors and would override any factor of racial consideration. In a certain situation the court feels this could be true. However, in the instant case, the court is of the opinion that the evidence on these factors was not conclusive and did not prove that a serious problem, or even one of very large proportions, existed in any of these categories: namely, traffic, distance, finance or classroom capacity."

In my opinion the judgment of the circuit court of Lake County should be affirmed.

Mr. Justice Ward joins in this dissent.

Mr. Justice Underwood, specially concurring:

I agree with the majority opinion insofar as it holds that racial considerations are constitutionally impermissible irrespective of whether the objective is segregation or integration and on that basis concur in the result.

APPENDIX 27

Text of Those Provisions of the Civil Rights Act of 1964 Here Involved Now Appearing As 42 U. S. C. 2000 c (b), 2000 c-6, 2000 c-9, 2000 d-3, 2000 e(b), 2000 e-1.

Section 401 (b): As used in this title— . . . "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, *but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.*

Section 407 (a): Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any

appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, *provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.* The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

Section 410: Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

Section 604: Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Section 701 (b): For the purposes of this title—. . . The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *a State or political subdivision thereof,* (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation, under Section 501 (c) of

the Internal Revenue Code of 1954: *Provided*, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employers (and their agents) shall not be considered employers: *Provided further*, That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

Section 702: This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to *an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.*

APPENDIX 28

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE ET AL.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION ET AL., JOHN W. GARDNER, as Secretary of Health, Education and Welfare of the United States; F. PETER LIBASSI, as Special Assistant to the Secretary of Health, Education and Welfare for Civil Rights and Director of the Office for Civil Rights of Health, Education and Welfare, and JAMES R. DUNN, Attorney, United States Department of Health, Education and Welfare,
Defendants.

(Filed July 28, 1967)

Before RIVES, Circuit Judge, and GROOMS and JOHNSON, District Judges.

PER CURIAM:

On March 22, 1967, this Court entered its order in this case[1] permanently enjoining the defendant State Board of Education, its members and the State Superintendent of Education from discriminating on the basis of race in the operation or conduct of the public schools of Alabama and

1. Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967).

requiring them to take affirmative action to disestablish all State enforced or encouraged public school segregation and more particularly requiring the State Superintendent of Education to notify certain named school systems that they were required to adopt a desegregation plan for all grades commencing with the 1967-68 school year meeting the standards embodied in a plan attached as Exhibit "A" to the decree and requiring that the State Superintendent of Education inform each of these local school systems that such plan was to be adopted within 20 days from the date of the decree and requiring, further, that the State Superintendent submit a report to this Court and all parties informing them what action had been taken by him in this connection and the results of such action.

Subsequently, as ordered by this Court, the defendant Ernest Stone as State Superintendent of Education submitted to the Court and to the parties his report as required. With this report the State Superintendent of Education submitted the desegregation plans adopted by the several school systems named in the court decree of March 22, 1967. Among these plans were plans adopted and submitted by the Lanett City school system, Lanett, Alabama. An examination of the desegregation plan promulgated and adopted by the Lanett City Board of Education reflects that said plan meets the standards embodied in the plan attached as Exhibit "A" to the court's decree. Subsequently the Lanett City school system in the implementation of its plan conducted a free choice period; the conduct of said free choice period by the said system, according to the reports filed with this Court, meets in every respect the requirements of this Court's order. Reports filed with this Court subsequent to the filing of the plan by the Lanett School Board reflect that the Board is in the process of implementing the plan as filed insofar as

its facilities, activities and other programs that are conducted or may be conducted or sponsored by the said school system are concerned. These reports as presented further reflect that the Lanett City school system is engaged in the process of, as required by the order of this Court and the plan filed by said school board, a school equalization program and, further, that said school board has taken affirmative steps to accomplish the desegregation of its school faculties in each of the schools operated by said school board effective with the 1967-68 school year.

Reports filed with this Court subsequent to the filing of this Court's order of March 22, 1967, further reflect that, with the exception of the Board of Education of Bibb County, Alabama, each of the 99 school systems listed in the order adopted a desegregation plan meeting the standards embodied in this court order and has taken affirmative steps to implement the plan as adopted as to free choice period, facilities, activities, school equalization program, and desegregation of faculties.[2]

This Court, by order of July 14, 1967, upon the oral motion of the City of Lanett School Board, made by and through its Superintendent, J. T. Greene, to the effect that the United States Department of Health, Education and Welfare, acting pursuant to Title VI of the 1964 Civil Rights Act and regulations promulgated thereunder, had terminated federal financial assistance to the Lanett City school system effective July 14, 1967, entered upon said date a

2. Bibb County, upon motion of the United States and after hearing before this Court, on May 18, 1967, was formally ordered to adopt a desegregation plan meeting the requirements of the plan set forth by this Court and to fully implement said plan. The only other exception is the school system of Marengo County, Alabama, which system has substantially adopted the desegregation plan of this Court, is in the process of implementing said plan, and has requested additional time of this Court to file its report setting forth the specific steps taken by the school system and the results achieved thereby.

temporary restraining order enjoining and restraining John D. Gardner, as Secretary of Health, Education and Welfare of the United States; F. Peter Libassi, as Special Assistant to the Secretary of Health, Education and Welfare for Civil Rights and Director of the Office for Civil Rights of Health, Education and Welfare, and James R. Dunn, Attorney, United States Department of Health, Education and Welfare, from terminating said federal financial assistance to the said school board and set this cause for a hearing for the purpose of determining whether the temporary restraining order should be enlarged into a preliminary and/or permanent injunction.

The issue squarely presented is whether the Department of Health, Education and Welfare, acting independently and without court approval, has the authority to terminate federal financial assistance to a school system when such school system is under a final court order, is in compliance with that order, and gives assurance to the Department of Health, Education and Welfare of compliance.

Upon a hearing of this matter, it appears that the Lanett City school system did, in fact, adopt as its plan of desegregation this Court's suggested plan, which plan was attached to the decree entered in this cause on March 22, 1967, and that subsequent to the adoption of said plan the Lanett City school system did, in fact, conduct a free choice period and otherwise implemented said desegregation plan insofar as its facilities, activities, and faculty desegregation are concerned. Further, said school board has and is taking affirmative steps to accomplish the desegregation of its school system as required by the order of this Court.

This Court is aware that Congress has placed upon the Department of Health, Education and Welfare and its officers, by virtue of Title VI of the 1964 Civil Rights Act,

an obligation to see that federal funds and federal financial support do not go to any state-supported program—or any program for that matter—in which there is discrimination based upon race or color. This of course includes school systems. It is also recognized that the Secretary of Health, Education and Welfare and the other officers of the Department of Health, Education and Welfare in carrying out this policy are obliged to assure themselves that there is no such discrimination. However, we are cognizant of a regulation of the Department of Health, Education and Welfare approved by the President of the United States on December 3, 1964, and which therefore has the force and effect of law, 45 C.F.R. 80.4(c), which requires that with respect to an elementary or secondary school system, "assurance of compliance" as prerequisite to obtaining federal financial assistance "shall be deemed to be satisfied" if such school system is subject to a final order of a court of the United States for the desegregation of such school system and if such school system gives assurance that it will comply with such order. The records of this Court reflect that on April 15, 1967, this Court and the other parties herein involved, including the State Superintendent of Education, were advised by a representative from the United States Department of Justice (now appearing as counsel for the Department of Health, Education and Welfare) that, if the school systems named in the order of March 22, 1967, adopted this Court's plan and submitted a copy to the Department of Health, Education and Welfare together with an assurance that they would comply with said order, such would meet the Title VI requirements insofar as the Department of Health, Education and Welfare was concerned.[3]

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3. Excerpt from the argument of Mr. St. John Barrett, Attorney, Civil Rights Division, United States Department of Justice, in open court on April 15, 1967:

The evidence in this case reflects that the action now being taken by the Secretary of Health, Education and Welfare, acting through his various assistants and representatives, in terminating federal financial assistance to the Lanett City school system is based upon a determination by those officials that the Lanett City school system was not, in fact, complying with the decree of this Court. In this connection, F. Peter Libassi testified:

> "Q. Mr. Libassi, at about that time [on March 22, 1967, the date this Court entered its order], did the question come for your decision whether or not the Lanett City System had satisfactorily brought itself back into compliance with a respect to Title VI requirements?
>
> A. Yes, sir; that issue was presented to us at that time.
>
> Q. Did you discuss it with the members of your staff?
>
> A. Yes, sir; I did.
>
> Q. What materials were available in your Department to assist you and your staff in making that decision?
>
> A. We had available the entire file and proceeding in the Lanett City System case, including the original field reports, as well as the documents submitted by the school system which have just been entered in the record. In addition, there were statistical reports on student and faculty desegregation for the District.

". . . The Commissioner, as Mr. Madison has pointed out, advised the ninety-nine school districts, or substantially all of them, I believe, that are named in this Court's decree that if they adopt the plan that was appended to this Court's decree, and if they implement it in good faith, that will meet the requirements that the Commissioner of Education lays down for the receipt of Federal financial assistance. He has requested those districts, if they adopt the Court's model plan, to submit a copy to him, together with an assurance that they will comply with it. He has made it clear, I believe, that insofar as there may be differences between this Court's plan and the Commissioner's Guidelines, he will accept compliance with this Court's plan as meeting the Title VI requirements. . . ."

Q. Now, what alternative decisions were available to you at that time?

A. We were faced with the decision as to whether or nor there were sufficient facts before us which would warrant a finding that this District had in fact brought itself into compliance or—with the provisions of Title VI, and by that we mean the provisions of the Court's decree and the model plan. If the facts were sufficient to make a finding, we would have done what we had done in other districts in Alabama, discontinued the hearing proceeding and established—re-established the District's eligibility; if we felt the facts did not warrant such a finding, then we would take no action; we would simply not intervene or inject ourselves into the orderly administrative process which was then taking place leading toward the termination of Federal funds.

Q. Are the facts now—no, I will withdraw that. What determination did you make?

A. We decided that the facts did not warrant a finding that the District was in fact in compliance.

Q. What was the basis for that decision?

A. First, there was the continued existence of the small Negro high school of a hundred and seventy-five students, and the existence of a white high school of approximately five hundred students. In addition, we reviewed the—

* *

Q. Had you completed your answer?

A. No. In addition to the information concerning the existence of the Negro school, and compared to the size of the white school, in our judgment, in reviewing the steps that were to be taken to equalize the facility, we felt that those steps would not in fact equalize the educational opportunities available to Negro high school students in the City System, and that under the Court's decree, the appropriate steps for the District to take was the consolidation or the phasing out of the

Negro high school. The School System planned certain expansion and remodeling programs at the Negro high school, which, under the decree, we felt should not have been undertaken, since they would have further entrenched and strengthened the segregation and the dual school system in Lanett City.

Q. Mr. Libassi—

A. Oh; in addition, there was a third factor—

Q. Yes, sir?

A. —and that was the low number of Negro students that had actually chosen to attend white schools in the fall, and no indication in the data as to what might be developing in the District during the next year or two, what additional steps might be taken; so for all of these reasons, it was our judgment that the District in fact was not complying with the decree of the Court and, therefore, we should not interfere in the administrative termination proceeding."

Under the facts now presented, this Court now specifically finds and concludes that the City of Lanett school system and the other 98 school systems listed in the order of this Court of March 22, 1967, were, when said order was entered and served, made "subject to a final order of a court of the United States for the desegregation" of such school systems within the meaning of 45 C.F.R. 80.4(c). We further find that the City of Lanett school system, as required by said regulation, has provided assurance of compliance to the Department of Health, Education and Welfare.

The argument of the Department of Health, Education and Welfare to the effect that the City of Lanett school system and the other 98 systems listed by this Court were not under a "court order" within the meaning of 45 C.F.R. 80.4(c) overlooks the real basis for the entry of this Court's statewide school desegregation order of March 22, 1967. This Court found, as a matter of fact, from evidence that

was presented and formed the basis for our order of July 13, 1964,[4] that the school system throughout the State of Alabama was actually controlled by the State Board of Education, the State Superintendent of education, and other state officials. In this connection, this Court stated:

> "The evidence in this case is clear that over the years the State Board of Education and the State Superintendent of Education have established and enforced rules and policies regarding the manner in which the city and county school systems exercise their responsibilities under State law. This control relates, among other things, to finances, accounting practices, textbooks, transportation, school construction and even Bible reading. The control by the State Board of Education over the local school systems is effected and rigidly maintained through control of the finances. . . .
>
> * * *
>
> ". . . Furthermore, as pointed out above, there is no question that the State Board of Education of Alabama has general control and supervision of the public schools of this State."[5]

Furthermore, the argument of the Department of Health, Education and Welfare that the individual school systems are not defendants within the meaning of 45 C.F.R. 80.4(c) ignores the fact that said school systems, by filing their desegregation plans with this Court as ordered, submitted to the jurisdiction of this Court. Certainly there is no question but that said school systems, including the City of Lanett system, did, by filing their desegregation plans with this Court and taking the steps that have been taken as reflected by the records of this Court to implement same, become "subject to a final order of a court of

4. *Lee* v. *Macon County Board of Education*, 231 F. Supp. 743 (M.D. Ala. 1964).

5. *Lee* v. *Macon County Board of Education*, supra Note 4, 231 F. Supp. at 750-51, 756.

the United States for the desegregation of such school or school system" within the meaning of 45 C.F.R. 80.4(c).

The fact that the City of Lanett school system and approximately 34 of the other school systems listed in the March 22, 1967, order had been declared "out of compliance" by the Department of Health, Education and Welfare prior to the March 22 order does not change the fact that, with the entry of that order on March 22, 1967, each of said school systems became "subject to a final order of a court of the United States for the desegregation of such . . . school system," and upon becoming subject to a final order of a court of the United States was automatically, by reason of becoming subject to said order and agreeing to comply with same, brought back "into compliance" within the meaning of 45 C.F.R. 80.4(c). In this connection, the regulation itself in part states:

> "In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered *after* submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order." (Emphasis added.)

Such a construction of the regulation as this Court now makes to the particular facts presented is in accord with the generally recognized rule that the courts are the branch of government ultimately responsible for the vindication of constitutional rights in the school area. This means nothing more or less than that judicial approval of a plan of desegregation—and particularly where there is good faith implementation of the plan by the school authorities—establishes eligibility for federal aid. In such instances, the Executive officials, acting through the Department of Health, Education and Welfare or any other branch of the government, may not, by terminating funds,

in effect disapprove a court-adopted plan. Neither may such officials finally determine, as Mr. Libassi's testimony as set out above reflects, that a school system is not in compliance with a court-adopted plan and act independently of any court action to terminate federal financial assistance. As the United States Court of Appeals for the Fifth Circuit stated in *U. S., et al.* v. *Jefferson County Board of Education*, 372 F. 2d 836 (which opinion was adopted, subject to certain clarifying statements that are not here pertinent, by the United States Court of Appeals for the Fifth Circuit sitting en banc, March 29, 1967, Fifth Circuit No. 23, 345, ... F. 2d .....):

> "Schools automatically qualify for federal aid whenever a final court order desegregating the school has been entered in the litigation and the school authorities agree to comply with the order."

The action taken by the Department of Health, Education and Welfare in this case in terminating federal financial assistance to a school system that was operating under the order of this Court without first bringing to the Court's attention its findings and views and assigning as one of its reasons for terminating federal financial assistance that there was a "low number of Negro students that had actually chosen to attend white schools in the fall" amounts to an attack on the "freedom of choice" method of desegregation despite its approval by this Court, and despite the judicial policy in this circuit of giving "freedom of choice" plans an opportunity to function. Such action by the Department of Health, Education and Welfare serves to thwart the implementation of the order of this Court. In issuing the original opinion and order in this case, it was recognized that "freedom of choice" as a method of desegregation might not fully and completely disestablish the dual public school system based upon race

and that periodic review of the method's effectiveness would be necessary. In this connection, jurisdiction was retained for the purpose of such reviews.[6]

The problem this Court is now presented with in this case was envisioned by this Court in a recent case involving the Department of Health, Education and Welfare's 1966 Guidelines.[7] In that case, the Department of Health, Education and Welfare was put on notice by the following language that it must respect a court order for the desegregation of a school or school system:

> "A Regulation of the Department of Health, Education and Welfare approved by the President on December 3, 1964, and which therefore has the force and effect of law, 45 C.F.R. 80.4(c), requires that with respect to elementary or secondary school systems, 'assurances of compliance' as prerequisites to obtaining federal financial assistance 'shall be deemed to be satisfied' if such school system is subject to a final order of a court of the United States for the desegregation of such school system and gives assurance that it will comply with such order. As courts attempt to cooperate with executive and legislative policies, so too the Department must respect a court order for the desegregation of a school or school system."

In summary, this Court now finds and concludes that the court order of March 22, 1967,[8] had the effect of restoring each of the 99 school systems listed therein to an "in compliance" status insofar as being eligible to receive federal financial assistance is concerned. The action of the Department of Health, Education and Welfare in terminat-

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6. *Lee* v. *Macon County Board of Education*, supra Note 1, 267 F. Supp. 458, at 479-80.

7. *Alabama NAACP State Conference of Branches et al.* v. *Wallace et al.*, ____ F. Supp. ____ (M.D. Ala., Civil Action No. 2457-N, May 3, 1967).

8. *Lee* v. *Macon County Board of Education*, supra Notes 1 and 6, 267 F. Supp. 458.

ing federal financial assistance to the City of Lanett school system based upon a determination of "noncompliance" made by the Department of Health, Education and Welfare prior to the entry of the said court order is invalid and in violation of the provisions of 45 C.F.R. 80.4(c). So that there cannot be any misunderstanding, as a general proposition, this Court now holds that there can be no termination of federal financial assistance by the Department of Health, Education and Welfare as to any of the school systems under the order of this Court, where said systems have given assurance of compliance to the Department of Health, Education and Welfare and are in full compliance with the requirements of the said court order, without prior Court approval. To permit the Department of Health, Education and Welfare to terminate funds to school systems under the order of this Court would be an abdication on the part of the Court of its authority to require compliance with a court order. There can be no administrative supervision or review of a judicial decree. There must be judicial approval of the termination of federal financial assistance when a school system is operating under a court order. The temporary restraining order entered in this case on July 14, 1967, will be enlarged into a preliminary injunction.

The action of this Court should not be misinterpreted. The Department of Health, Education and Welfare continues to have the authority, even the duty, under congressional mandate for examining performance on the part of the school systems for the purpose of determining if there is good faith compliance with the order of this Court. The injunction to be issued in this cause does not mean that the Department of Health, Education and Welfare cannot and shall not supervise and audit the school systems subject to the order of this Court for the purpose of determining if the said school systems are effectively implementing the order of this Court. However, the procedure

to be followed, if the Department of Health, Education and Welfare determines that a school system is not effectively complying with the order of this Court and determines further that there should be a termination of federal financial assistance, is for the Department of Health, Education and Welfare, by formal petition, to call such matter to the Court's attention so that a judicial determination may be made in the matter prior to an actual termination of federal financial assistance.

In consideration of the foregoing and for good cause, it is the ORDER, JUDGMENT and DECREE of this Court that the defendants John W. Gardner, as Secretary of Health, Education and Welfare of the United States, F. Peter Libassi, as Special Assistant to the Secretary of Health, Education and Welfare for Civil Rights and Director of the Office for Civil Rights of Health, Education and Welfare, and James R. Dunn, Attorney for the United States Department of Health, Education and Welfare, together with their agents, officers, successors and all others acting in concert or participation with them, be and each is hereby enjoined from terminating or deferring any federal financial assistance to the Lanett City Schools, Lanett, Alabama, or any other school or school system listed by this Court in the order made and entered herein on March 22, 1967, until further order of this Court.

It is further ORDERED, ADJUDGED and DECREED that John W. Gardner, as Secretary of Health, Education and Welfare of the United States, F. Peter Libassi, as Special Assistant to the Secretary of Health, Education and Welfare for Civil Rights and Director of the Office for Civil Rights of Health, Education and Welfare, and James R. Dunn, Attorney, United States Department of Health, Education and Welfare, their agents, officers, successors and all others acting in concert or participation with them, immediately take the necessary and appropriate affirmative steps to rescind the Department of Health, Educa-

tion and Welfare's action deferring or terminating federal financial assistance to any school system named in the March 22, 1967, order of this Court and to notify each school system named in said order of this Court that has had federal financial assistance deferred or terminated by the Department of Health, Education and Welfare that each of said school systems is now, in all respects, eligible to receive federal financial assistance through the administration of Titles IV and VI of the 1964 Civil Rights Act.

The Clerk of this Court is ORDERED and DIRECTED to take the necessary steps to have the United States Marshal for this district serve a copy of this opinion and preliminary injunction upon the Honorable Ben Hardeman, United States Attorney for the Middle District of Alabama, Montgomery, Alabama, and by registered mail to serve copies upon the Honorable Ramsey Clark, Attorney General, United States Department of Justice, Washington, D. C., and by registered mail to serve copies upon John W. Gardner, as Secretary of Health, Education and Welfare of the United States, F. Peter Libassi, Special Assistant to the Secretary of Health, Education and Welfare for Civil Rights and Director of the Office for Civil Rights of Health, Education and Welfare, and James R. Dunn, Attorney for the United States Department of Health, Education and Welfare.

The Clerk of this Court is further ORDERED and DIRECTED to forward a copy of this opinion and preliminary injunction to the superintendent of each of the ninety-nine school systems presently operating under this Court's orders.

Done, this the 28th day of July, 1967.

/s/ Richard T. Rives
United States Circuit Judge.
/s/ H. H. Grooms
United States District Judge
/s/ Frank M. Johnson, Jr.
United States District Judge

APPENDIX 29

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE, et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION, et al.,
Defendants.

Motion for Extension of Time under Rules 13 and 15 of the Rules of the Supreme Court of the United States

This motion is filed to request an extension of time in the filing of the record by the Clerk of the United States District Court for the Middle District of Alabama, Eastern Division, and the Jurisdictional Statement by the appellants under Rule 15 of the Rules of the Supreme Court of the United States in behalf of Lurleen Burns Wallace, Governor of the State of Alabama and President Alabama State School Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer, and James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrill, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Word and Harold C. Martin, Members, Alabama State Board of Education.

The movants show that John C. Satterfield is the leading counsel in this case; that subsequent to the granting of the extension of time to and including August 5, 1967, for the filing of the record in this case and the Jurisdic-

tional Statement by the Appellants, such record has been prepared and is ready for filing and such Jurisdictional Statement and all appendices thereto have been prepared and are now in the process of being printed; that the completion thereof and the placing in the hands of the printer was delayed by the fact that the mother of the undersigned counsel of record died last week after a severe heart attack; that it appears it will not be possible for the Jurisdictional Statement to be printed, served and filed as provided by the Rules of this Court by noon August 5, 1967, but they will be thus printed, served and filed within nine days thereafter. Hence, this motion is filed asking for an extension of such time for nine additional days up to and including August 14, 1967. That the extension as asked in this motion will not prejudice the plaintiffs or plaintiff-intervenor in this case.

That Rule 13 of the Rules of the Supreme Court of the United States, Paragraph (1) provides as follows:

> It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court not more than sixty days after the filing of the notice of appeal. But, for good cause shown, any judge of the court whose decision is being appealed or in which the notice of appeal is filed (or a justice of this court if application has first been made below), may enlarge the time for docketing the case. Where application under this rule is made to a justice of this court, Rule 34 (2) governs timeliness. All other applications hereunder must be presented to the judge in question before the expiration of the original sixty-day period.

That this motion is filed within the period set forth in Rule 34 (2) of the Rules of the Supreme Court of the United States.

That the Clerk of the United States District Court for the Middle District of Alabama, Eastern Division, is prepared to file the record with the Clerk of the Supreme Court of the United States as provided by the Rules of this Court and within the time required by the Rules of the Supreme Court. However, the Rules of the Supreme Court of the United States provide as follows in Rule 13 (2):

> Upon the filing in this court of the record brought up by appeal, counsel for the appellant shall enter his appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 33, forty copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case will then be placed on the appellate docket.

As the appellants and movants desire to make a full, complete and proper presentation of this matter to the Supreme Court of the United States, they move that there be allowed an additional nine days after August 5, 1967, to-wit: up to and including August 14, 1967, for the filing of the record and the Jurisdictional Statement as provided

in Rules 13 and 15 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

MacDonald Gallion
Attorney General of Alabama
Alabama State Office Building
Montgomery, Alabama
Gordon Madison
Assistant Attorney General of Alabama
State Capitol
Montgomery, Alabama
Nicholas S. Hare
Special Assistant Attorney General
Tyson Building
Montgomery, Alabama
Maury D. Smith
325 Bell Building
Montgomery, Alabama
John C. Satterfield
Masonic Building
Yazoo City, Mississippi
By /s/ John C. Satterfield
Attorneys for Appellants and Movants
Goodwyn, Smith & Bowman
325 Bell Building
Montgomery, Alabama
Satterfield, Shell, Williams and Buford
First National Bank Building
Jackson, Mississippi
Of Counsel

STATE OF MISSISSIPPI
COUNTY OF YAZOO

Personally appeared before me the undersigned authority in and for said County and State, John C. Satterfield, one of the attorneys and the leading counsel in the above styled cause, who first being duly sworn states on oath that the matters and things set forth in the above Motion for Extension of Time Under Rules 13 and 15 of the Rules of the Supreme Court of the United States are true as therein stated.

/s/ John C. Satterfield

SWORN TO and subscribed before me on this the 31st day of July, 1967.

/s/ Ruby M. Fraiser
(Seal) Notary Public
My Commission Expires: 2-1-71

CERTIFICATE

I, John C. Satterfield, one of the attorneys for Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of the Alabama State School Board of Education, and the other Appellants and Movants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 31st day of July, 1967, I served copies of the foregoing Motion for Extension of Time under Rules 13 and 15 of the Rules of the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof with air mail postage prepaid to Ben Hardeman, Esquire, United States Attorney for the Middle District of Alabama, at Room 302, Federal Building, Montgomery, Alabama, and

by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C.

2. On the Plaintiffs and Plaintiff-Intervenor and Amicus Curiae, by mailing copies, in duly addressed envelopes, with air mail postage prepaid, to the respective attorneys of record as follows:

Ramsey Clark, Esquire
United States Attorney
General
Washington, D. C.

St. John Barrett, Esquire
Department of Justice
Civil Rights Division
Washington, D. C.

Brian K. Landsberg, Esquire
Department of Justice
Civil Rights Division
Washington, D. C.

Solicitor General
Department of Justice
Washington, D. C.

Fred D. Gray, Esquire
34 North Perry Street
Montgomery, Alabama

Melvyn Zarr, Esquire
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

Henry M. Aronson, Esquire
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

This the 31st day of July, 1967.

/s/ John C. Satterfield
One of the Attorneys for the
Above Named Appellants
and Movants

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE, et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION, et al.,
Defendants.

Order Granting Extension of an Additional Nine Days for Filing of Record and Jurisdictional Statement in the Supreme Court of the United States under Rules 13 and 15 of Such Court

This matter coming on to be heard upon motion of all of the appellants in the appeal which is now pending to the Supreme Court of the United States under Notice of Appeal filed in accordance with Rules 10 through 12 of the Rules of the Supreme Court of the United States, being fully advised in the premises, finding that under Rule 13 of the Rules of the Supreme Court of the United States, "any judge of the court whose decision is being appealed . . . may enlarge the time for the docketing of the case", and further finding that by sworn motion having the effect under the rules of this Court of an affidavit good cause has been shown for the enlargement of the time for the docketing of the case in the Supreme Court of the United States and the filing of the Jurisdictional Statement in this case under Rules 13 and 15 of the Supreme Court of the United States, and the Court further finding that this Judge as "a judge of the court whose decision is being appealed" has full authority to enter this order:

IT IS THEREFORE ORDERED AND ADJUDGED that the time for the filing of the record herein be extended for an additional nine days, to-wit: to and including August 14, 1967, and that the Jurisdictional Statement to be filed in behalf of Lurleen Burns Wallace, Governor of the State of Alabama and President of the Alabama State Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer; and James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrill, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Word and Harold C. Martin, Members, Alabama State Board of Education, may be filed at any time on or prior to August 14, 1967.

ORDERED AND ADJUDGED this the ..... day of August, 1967.

.....

Member of the Three-Judge Court
Acting in the Above Styled Cause

APPENDIX 30

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE, et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and Amicus Curiae,

v.

MACON COUNTY BOARD OF EDUCATION, et al.,
Defendants.

Motion for More Specific Relief Implementing Section III of the Court's Decree of March 22, 1967

The United States, Plaintiff-Intervenor and *amicus curiae* herein, moves the Court for an order to implement more specifically Section III of its Decree of March 22, 1967, concerning transportation, by requiring the defendant Ernest Stone, as State Superintendent of Education:

1. To require each of the following school systems to supplement the information it has furnished the State Superintendent with respect to bus transportation in the following manner:

a. The Tuscaloosa City school system should inform the State Superintendent, as to each bus in its system, of its capacity, the number of white students and Negro students to be transported, the number of miles traveled one way, and the school or schools to be served;

b. The Lamar County school system should inform the State Superintendent, as to each bus in its system, of the expected number of white students and Negro students to be transported and of the school or schools to be served;

c. The Conecuh County and the Escambia County systems should inform the State Superintendent, as to each bus in their respective systems, of the expected number of white students and Negro students to be transported; and

d. Each of the school systems listed below should inform the State Superintendent, as to each bus in its system, of the expected number of white students and Negro students to be transported and of the school or schools to be served (if any) in addition to the terminal school previously reported:

Alexander City
Anniston
Attalla
Autauga County
Baldwin County
Bibb County
Blount County
Brewton
Butler County
Calhoun County
Chambers County
Cherokee County
Chilton County
Clarke County
Clay County
Cleburne County
Coffee County
Colbert County
Coosa County
Covington County
Cullman County
Dale County
Dallas County
DeKalb County
Elmore County
Etowah County
Fayette County
Franklin County
Geneva County
Greene County
Henry County
Houston County
Jackson County
Lauderdale County
Lee County
Limestone County
Marengo County
Marion County
Marshall County
Monroe County
Morgan County
Pickens County
Pike County
Randolph County
Russell County
St. Clair County
Shelby County
Sumter County
Sylacauga
Talladega City
Talladega County
Tallapoosa County
Tuscaloosa County
Walker County
Washington County
Winston County

2. To approve or disapprove the proposed bus transportation routes, criteria governing the availability of bus transportation, and the letters to parents concerning bus transportation submitted by each school system, as required by the Decree of March 22, 1967.

3. To require, with respect to those systems whose routes, criteria, or letters to parents he disapproves, of each such system that it submit routes, criteria, or letters meeting the standards of its desegregation plan, which the State Superintendent has previously submitted to this Court.

4. To report to this Court no later than August 15, 1967, the results of the action required herein. The report shall include a description of all overlapping and duplicative bus routes based on race heretofore maintained that have been eliminated as a result of the efforts of the State Superintendent pursuant to the provisions of the Decree of March 22, 1967. If any such routes have not been eliminated, they should be specifically referred to in the report and the reasons given why they cannot or have not been eliminated.

This motion is made upon the following grounds:

1. On March 22, 1967, this Court entered its order in this case permanently enjoining the defendant State Board of Education, its members, and the State Superintendent of Education from discriminating on the basis of race in the operation or conduct of the public schools of Alabama and requiring them to take affirmative action to disestablish all State enforced or encouraged public school segregation, and, more particularly:

a. Ordering the defendant state officials to require all local school boards named in this motion, prior to the commencement of the 1967-68 school year, to eliminate

race as a basis for assigning students to school buses and to eliminate overlapping and duplicative bus routes based on race;

b. Ordering the defendant state officials to require that all local school boards named in this motion establish nondiscriminatory criteria governing the availability of bus transportation to students;

c. Ordering the State Superintendent of Education to require all local school boards named in this motion to submit to him for approval their proposed bus routes and criteria and ordering him to approve or disapprove said routes and criteria; and

d. Ordering the State Superintendent to require all local school boards named in this motion to communicate those routes and criteria he has approved to students and parents in a readily understandable manner.

2. On May 1, 1967, the Court granted the defendant State Superintendent an extension of time until July 15, 1967, to approve or disapprove said routes and criteria. The Order herein of March 22, 1967, required the State Superintendent to report to the Court whether he had approved or disapproved said routes and criteria.

3. On July 14, 1967, the defendant Ernest Stone submitted to the Court materials relative to pupil transportation in the 60 school systems named in this motion. The defendant Stone did not indicate whether he had approved or disapproved the transportation routes, criteria, or letters that he was submitting.

4. The letters to parents submitted by the Alexander City, Anniston, Bibb County, Butler County, Chambers County, Chilton County, Cleburne County, Lee County, Limestone County, Marion County, Marshall County, Morgan County, Randolph County, Shelby County, Sumter

County, Tallapoosa County, and Walker County school systems do not meet the standards embodied in the transportation provisions of their respective desegregation plans, which the State Superintendent previously submitted to this Court. The deficiencies are described in the report of the United States, a copy of which is attached hereto and made a part hereof. The letter submitted by the Autauga County school system is adequate, but the materials submitted by the State Superintendent show that the letter was not sent to the parents of new and prospective students. The Attalla school system submitted no letter.

5. The transportation criteria submitted by the Walker County school system does not meet the standards of the transportation provisions of its desegregation plan, as appears more specifically in the attached copy of the report of the United States. The Anniston and Attalla school systems failed to submit criteria.

6. The materials the State Superintendent transmitted to the Court do not contain sufficient information from which to determine adequately the extent to which the proposed transportation routes of the 60 school systems named in this motion meet or do not meet the standards embodied in their respective plans.

7. There is substantial reason to believe that overlapping and duplicative bus routes based on race have not been eliminated from the transportation maps transmitted to the Court by the State Superintendent, as appears more specifically in the attached copy of the report of the United States and the affidavits of Kenneth P. Frankland and Frank W. Hill, which are attached hereto and made a part hereof.

This motion is based on the pleadings, evidence, reports, and papers on file in this case.

Respectfully submitted,

John Doar
Assistant Attorney General
Ben Hardeman
United States Attorney
St. John Barrett
Charles Quaintance
Attorneys
Department of Justice

AFFADIVIT

STATE OF ALABAMA)
) SS
COUNTY OF MONTGOMERY)

KENNETH P. FRANKLAND, being first duly sworn says:

I am an Attorney for the United States of America assigned to the case of *Lee, et al. v. Macon County Board of Education, et al.*, Civil Action No. 604-E and as part of my assignment I have examined the transportation reports of the Autauga County, Chambers County and Limestone County Boards of Education submitted to this Court by the Alabama State Superintendent on July 14, 1967, and I am familiar with the exhibits in this case pertaining to each county. As part of my assignment I have contacted John R. Hargis, Superintendent of Autauga County, Morse Haynes, Superintendent of Chambers County schools and E. Price Black, Transportation Supervisor of Limestone County schools for additional information in order to evaluate each transportation report. From my examination of exhibits, reports and conversations, I am informed and believe that:

1. *Autauga County*

There are 54 bus routes operated by the Autauga County Board of Education for the 1967-68 school year of which 30 provide transportation to more than one school. Of these, 18 serve only predominantly white schools; 10 serve only predominantly Negro schools; and 2 serve a Negro school and may serve a predominantly white school. Within the greater Prattville area, the county's largest town, there are six schools, four predominantly white and two predominantly Negro. Mr. Hargis stated that each of 16 buses assigned to Autauga County High School in Prattville serves each of the four predominantly white schools, but neither of the two predominantly Negro schools, and each of the eight buses assigned to provide transportation to North Highland serves each of the two Negro schools, but none of the four white schools. Of the 54 buses operated by the County, 52 offer service only to schools predominantly of one race.

Mr. Hargis further advised that no buses serve schools of each race with the possible exception that white students who desire transportation to predominantly white Hicks Memorial School in Autaugaville may ride two buses transporting Negro students to the predominantly Negro Autauga County Training School. Negro students attending the four predominantly white schools in Prattville will be transported on five buses assigned for service to those schools.

On June 27, 1967, at a conference attended by representatives of the State Board of Education, Autauga County Board of Education and myself, Mr. Hargis was advised that the transportation routes in the Autaugaville, Jones—New Salem, and Prattville areas suggested duplication of routes based upon race. At that time Mr. Hargis indicated

efforts would be made to make changes to eliminate duplicative routes. The only changes made were in six routes in the Autaugaville area.

2. *Chambers County*

There are 61 bus routes operated by the Chambers County Board of Education for the 1967-68 school year, of which 21 provide transportation to more than one school. Of these, 11 serve only predominantly white schools; 9 serve only predominantly Negro schools; and Mr. Haynes stated that one bus serves two Negro schools then transports ten Negro students to a predominantly white school. With this exception, all other buses are routed to serve schools attended by students predominantly of one race. Mr. Haynes stated that approximately 10 Negro students who chose to attend predominantly white schools have been assigned to four buses serving predominantly white schools and that no white students have been assigned to buses serving predominantly Negro schools.

3. *Limestone County*

There are 78 bus routes operated by the Limestone County Board of Education for the 1967-68 school year of which 30 serve more than one school. Of these, 19 serve only predominantly white schools and 11 serve only predominantly Negro schools. Mr. Black advised that of the 78 bus routes no bus serves both predominantly white and Negro schools. Mr. Black stated that at least 16 buses assigned to predominantly white schools will transport Negro students to white schools and that at least 80 Negro students have been assigned to those buses. No white students have been assigned to Negro buses.

/s/ Kenneth P. Frankland

Sworn to and subscribed before me this ..... day of July, 1967.

AFFADIVIT

STATE OF ALABAMA)
) SS
COUNTY OF MONTGOMERY)

FRANK W. HILL, being first duly sworn, says:

I am an Attorney for the United States of America assigned to the case of *Lee, et al.* v. *Macon County Board of Education, et al.*, and as part of my assignment I have examined the transportation reports of the Sumter County, Russell County and Chilton County Boards of Education submitted to this Court by Dr. Ernest Stone, Superintendent of Education for the State of Alabama on July 14, 1967. As an additional part of my assignment, I have contacted the Transportation Supervisor of Sumter County, Mr. Lawrence Ramsey, the Transportation Supervisor of Russell County, Mr. Willis Grimm, and the Transportation Supervisor of Chilton County, Mr. Lee Lawrence.

Based upon my conversation with the above-named persons and upon my review of the transportation report of the three aforementioned counties, I am informed and believe that the following information is true and correct:

	Sumter County	Chilton County	Russell County
Total Number of Buses	49	63	50
Buses Serving More Than One School	16	32	11
Buses Serving Both a White and a Negro School	0	0	5
Number of Buses Serving Predominantly White Schools	13	53	20

	Sumter County	Chilton County	Russell County
Number of Buses Serving Only Predominantly White Schools	13	53	17
Number of Buses Serving Predominantly Negro Schools	36	10	30
Number of Buses Serving Only Predominantly Negro Schools	36	10	28
Number of Negroes on Predominantly White Buses[1]	7-9	4-8	37
Number of White Students on Predominantly Negro Buses	0	0	25[2]

/s/ Frank W. Hill

Sworn to and subscribed before me this .....day of July, 1967.

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1. Estimates from the transportation supervisors; the supervisor for Sumter County and Chilton County told me that all of the Negro children who ride predominantly white buses attend predominantly white schools.

2. Estimate from the transportation supervisor.

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE, et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and Amicus Curiae,

v.

MACON COUNTY BOARD OF EDUCATION, et al.,
Defendants.

Report of the United States upon Transportation Routes, Criteria, and Letters Transmitted to the Court by the State Superintendent of Education

The State Superintendent of Education has transmitted to the Court bus transportation route maps from 60 local school systems named in this Court's Decree of March 22, 1967. Those 60 systems constitute all of the 99 systems named in the Decree of March 22, 1967, that operate bus transportation systems. He also transmitted criteria governing eligibility for transportation from 55 school systems and letters to parents concerning transportation from 54 systems. This report of the United States is submitted in order to inform the Court of the extent to which the transmitted materials meet the standards embodied in the Decree of March 22, 1967, and to inform the Court of the extent to which the State Superintendent has complied with the requirements of Section III of that Decree.

1. Criteria

Our review indicates that of the 60 local school systems that are named in the Decree of this Court of March 22,

1967, and that maintain transportation systems, 54 have submitted adequate criteria governing the availability of bus transportation to students.

Three other systems—Blount, Franklin, and Winston—are not required to adopt such criteria, as they maintain no Negro schools and have assured the State Superintendent that they do not discriminate on the basis of race in the operation of their transportation systems.

The Anniston and Attalla school systems failed to submit criteria, although their desegregation plans require them to do so.

The Walker County school system adopted criteria that are inadequate in that they provide, "Pupils will be permitted to ride a school bus only to the school nearest their residence which serves their grade." Walker County's desegregation plan, submitted to this Court, requires the system to route buses to the maximum extent feasible to serve each student choosing any school in the system.

2. Letters to Parents:

Our review indicates that 39 systems have adopted adequate letters to parents. The Blount, Franklin, and Winston county systems were not required to and did not adopt letters to parents concerning transportation. The Attalla school system did not submit a letter, although its desegregation plan requires that it do so. The remaining 17 of the 60 systems that transport students have adopted letters that do not meet the standards required by their desegregation plans.

Of those 17 systems, the letters of the following 12 are deficient in that they do not adequately advise the parents

of the criteria for availability of bus transportation as required by the systems' desegregation plans:

Anniston	Limestone County
Bibb County	Marion County
Butler County	Randolph County
Chambers County	Shelby County
Cleburne County	Sumter County
Lee County	Walker County

The letters of the following five systems are deficient in that they do not inform the parents of where they can obtain information concerning specific bus routes, as required by the systems' desegregation plans:

Alexander City
Chilton County
Marshall County
Morgan County
Tallapoosa County

The deficiencies in the letter of each system listed in the two preceding paragraphs could be cured by the simple expedient of enclosing with the letter to parents a copy of the particular system's transportation criteria.

3. Transportation Routes.

The desegregation plans of all 60 systems that provide bus transportation require that transportation be provided without discrimination based on race. In addition, all of the 60 systems except those that no longer maintain Negro schools are obligated under their desegregation plans to eliminate overlapping and duplicative bus routes based on race. Each of the 60 systems did submit bus route maps to State Superintendent Stone. However, none of the 60 systems provided adequate information concerning their proposed bus routes to make it possible to determine ade-

quately the extent to which the systems fulfilled their obligations not to discriminate and to eliminate overlapping and duplicative bus routes based on race.

In order to make an adequate determination of whether those obligations have been met, it is necessary to know, as to each bus in the system, the number of its route, its capacity, the expected number by race of students it is to transport, the number of miles it is to travel, and the schools it is to serve. At the request of the State Superintendent, all but two of the 60 systems provided the following information as to each bus: route number, capacity, expected load, miles traveled (one way), and terminal school. The State Superintendent did not request, and no school system provided, the estimated number of white students and the estimated number of Negro students to be transported on each bus route. The State Superintendent did not request and only the Conecuh County and Escambia County school systems provided the names of any school or schools each bus serves in addition to the terminal school. The Lamar County system did not provide the names of even the terminal schools served, but it did provide the other types of information the State Superintendent requested. Tuscaloosa's city system provided no information concerning its bus routes.

We obtained some of the necessary additional information from the officials of six of the 60 school systems that provide transportation to students. Thereafter, we analyzed the route maps of those six systems—Autauga County, Chambers County, Chilton County, Limestone County, Russell County, and Sumter County—submitted to the State Superintendent. We determined that one of the six systems, Russell County, had taken substantial steps toward eliminating overlapping and duplicative bus routes based on race. We determined that one other system, Au-

tauga County, has made token efforts toward eliminating its dual system of buses. We determined that the other four systems had taken no steps toward unifying its white and Negro bus route systems, other than permitting most of the Negro students who have chosen to attend predominantly white schools to ride predominantly white buses.

We could not have made these determinations adequately had we not obtained information concerning the race of students transported and the intermediate schools each bus serves. We determined that in each system it is common for buses to serve more than one school, but that only in Russell County, and possibly in Autauga County, will even a single bus serve both a Negro and a white or predominantly white school.

We are attaching to this report as Attachment A which is attached hereto and made a part hereof, our analyses of the proposed transportation routes for Russell County and Sumter County. We have also included in Attachment A descriptions of some of the overlapping and duplication based on race that appear in the proposed transportation route maps of the Autauga, Chambers, Chilton, and Limestone county systems.

4. Report of the State Superintendent.

Section III of the Decree of March 22, 1967, required the State Superintendent to approve or disapprove the transportation routes and criteria governing availability of transportation for each school system that is named in the Decree and that maintains a transportation system. It also ordered him to require the said local school boards to communicate those routes and criteria to students and parents in a readily understandable manner. In an Order dated May 1, 1967, this Court permitted the State Superin-

tendent until July 15, 1967, to approve or disapprove the routes and criteria.

Prior to reporting to this Court the State Superintendent or his agents did make suggestions to some districts concerning their proposed routes, criteria, or letters. See, for example, the affidavit of Kenneth P. Frankland, which is attached to the motion filed with this report.

However, there is no evidence in the record that the State Superintendent approved or disapproved any of the routes or criteria or letters. In his letter of July 14, 1967, transmitting the transportation materials from 60 local school systems, the State Superintendent states, "The above-captioned Court Order directed me as State Superintendent of Education to submit to the Court materials relative to pupil transportation . . . ". He does not refer to the fact the Court Order also required him to approve or disapprove the routes and criteria and to require effective notice to parents and students, and he has not done so.

Respectfully submitted,

John Doar
Assistant Attorney General
Ben Hardeman
United States Attorney
St. John Barrett
Charles Quaintance
Attorneys
Department of Justice

ATTACHMENT A

Summary of Overlapping Transportation Routes in Six Counties

The analyses and summaries that follow are based in part on the bus transportation route maps and information provided by school systems for Autauga County, Chambers County, Chilton County, Limestone County, Russell County, and Sumter County to the State Superintendent of Education, who transmitted them to the Court. The analyses and summaries are further based on previously filed reports of the results of the choice periods in the six counties, which show the predominant race of their schools, and the affidavits of Kenneth P. Frankland and Frank W. Hill which are attached to the Motion filed with this report.

1. *Russell County*

The Russell County school system plans to operate 50 buses during the 1967-68 school year. Of these, five will stop at a school attended predominantly by white children and also at a school attended predominantly by Negro children. Twenty-eight will transport only Negro children and stop only at Negro schools. Seventeen buses will serve only schools which are attended predominantly by white students.

In most areas of the county, there is relatively little overlapping of "white" and "Negro" bus routes. For example, in the southwest quadrant of the county (the area between State Highway 26 and U.S. Highway 431) only one predominantly white bus is routed, and that bus (No. 52) will serve both the predominantly white and the all Negro schools in Hurtsboro. Similarly, in the northwest quadrant of the county (the area north of State

Highway 26, west of State Highway 169, and south of U. S. Highway 80) the only predominantly white bus also serves Wills Valley School, an all Negro facility. In the southeast quadrant (the area south of Macedonia Church and east of U. S. Highway 431) the only predominantly white bus (No. 11) also serves the all Negro Oliver School.

Some duplication of routes still exists in the northeast quadrant of the county. For example, routes No. 6, No. 8 and perhaps No. 10 appear to duplicate unnecessarily routes followed by buses serving all Negro schools. Too, No. 14 and No. 15 in the extreme northern part of the county appear to require some alteration in order to eliminate overlapping.

An evaluation of the transportation report of Russell County reflects that, while further revisions of routes are probably necessary, a substantial beginning has been made to bring about a unitary, non-racial bus system in that county.

2. *Sumter County*

There are 49 school buses that will be operated in Sumter County during the 1967-68 school year. Of these, 16 will, under present plans, stop at more than one school, but none will stop at both a predominantly white and a predominantly Negro school. Under the proposed transportation plan for Sumter County, 13 buses would transport only Negro students and stop only at schools attended solely by Negro children. The remaining 36 buses would carry all the County's white children who ride buses and approximately seven Negro children who attend predominantly white schools. None of those 36 buses would stop at a school attended predominantly by Negro children.

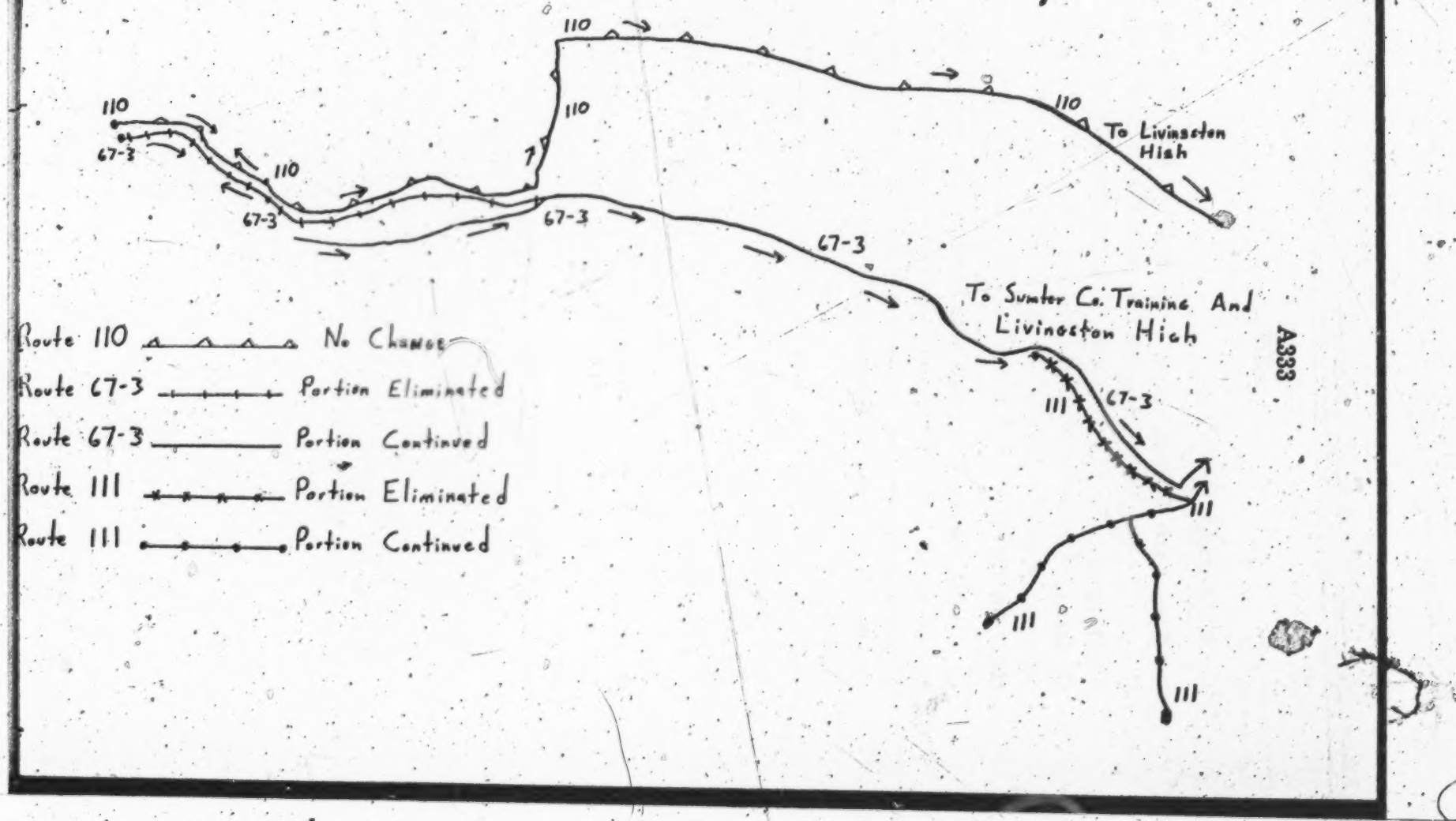
Thirteen of the buses which stop only at predominantly white schools terminate their routes in towns in which a

school attended predominantly by Negro students is also located. Twenty-two buses which serve only all Negro schools terminate their routes in towns in which a school attended predominantly by white children is also located.

Six buses which stop only at schools attended predominantly by white students pass near schools attended solely by Negro students. At least one bus which stops only at a school attended solely by Negro students passes by a school attended predominantly by white students.

Overlapping bus routes still exist which have the effect of maintaining a dual transportation system for Negro and for white children. At least four areas in the county are served by duplicate bus routes which are, in part or in whole, unnecessary. Those areas are Belmont, Cuba, Emelle, and Livingston. Many of those duplicative routes can be eliminated without substantial difficulty. For example, bus No. 110, which serves the predominantly white Livingston High School in Livingston, Alabama, runs, in part, the same route that bus No. 67-3 traverses. Bus No. 67-3 serves the all Negro Sumter County Training School, also located in Livingston, Alabama. Bus No. 110 has a capacity of 48, and transports only 25 students into Livingston. By having bus No. 110 pick up both white and Negro students at the west end of its route, bus No. 67-3 could eliminate the unnecessary westerly portion of its route, head directly east, and pick up the white children currently riding bus No. 111. Thus, substantial portions of the routes of bus No. 67-3 and bus No. 111 could be eliminated simply by having bus No. 110 transport all the children along its routes into Livingston, rather than only the white students, as it now does. The following page illustrates both present and possible alternate routes for buses No. 110, No. 67-3 and No. 111.

SUMTER COUNTY



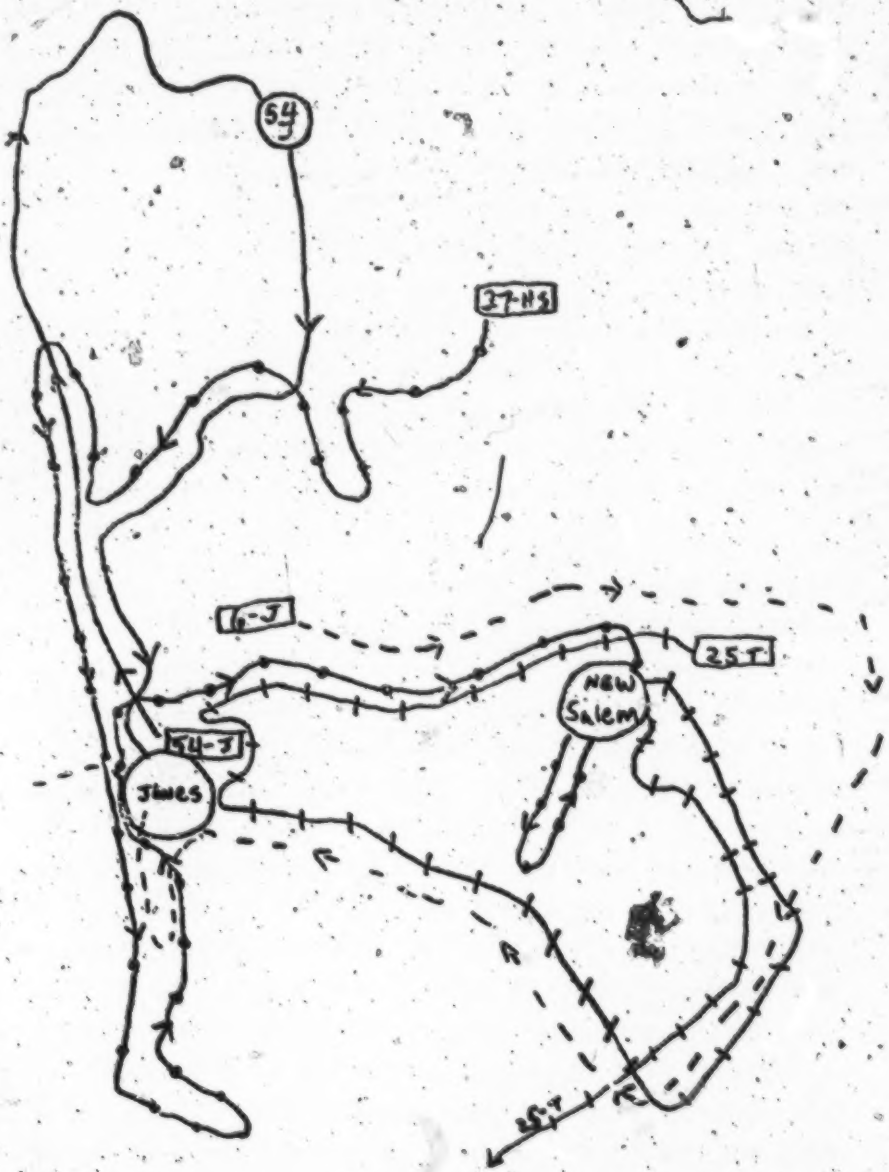
3. *Autauga County*

There are 54 bus routes operated by the Aufauga County Board of Education for the 1967-68 school year of which 30 provide transportation to more than one school. Of these, 18 serve only predominantly white schools; ten serve only predominantly Negro schools; and two may offer transportation to both white and Negro schools.

In the greater Prattville area buses are routed so that no bus serves both predominantly white and predominantly Negro schools. Sixteen routes serve each of the four predominantly white schools and eight of those make two trips each. Negro students attending white schools in Prattville will ride five of these buses. There are eight bus routes serving two Negro schools, and four of these made two trips each.

Similarly, there is duplication of routes based on race in the Jones-New Salem area. Buses 54 J and 6 J serve 55 students at the predominantly white Jones School, while buses 27 N.S. and 25 T serve approximately 65 students at the all Negro New Salem School. Bus 54 J has a capacity of 54, but only carries 19 white students. Bus 6 J also has a capacity of 54, but carries only 36 white students. The diagram on the next page shows the present overlapping routes, while the diagram on the page after that illustrates a possible reorganization that would eliminate one route and eliminate several miles from the route of bus 25 T, permitting it to take a more direct route to Autaugaville.

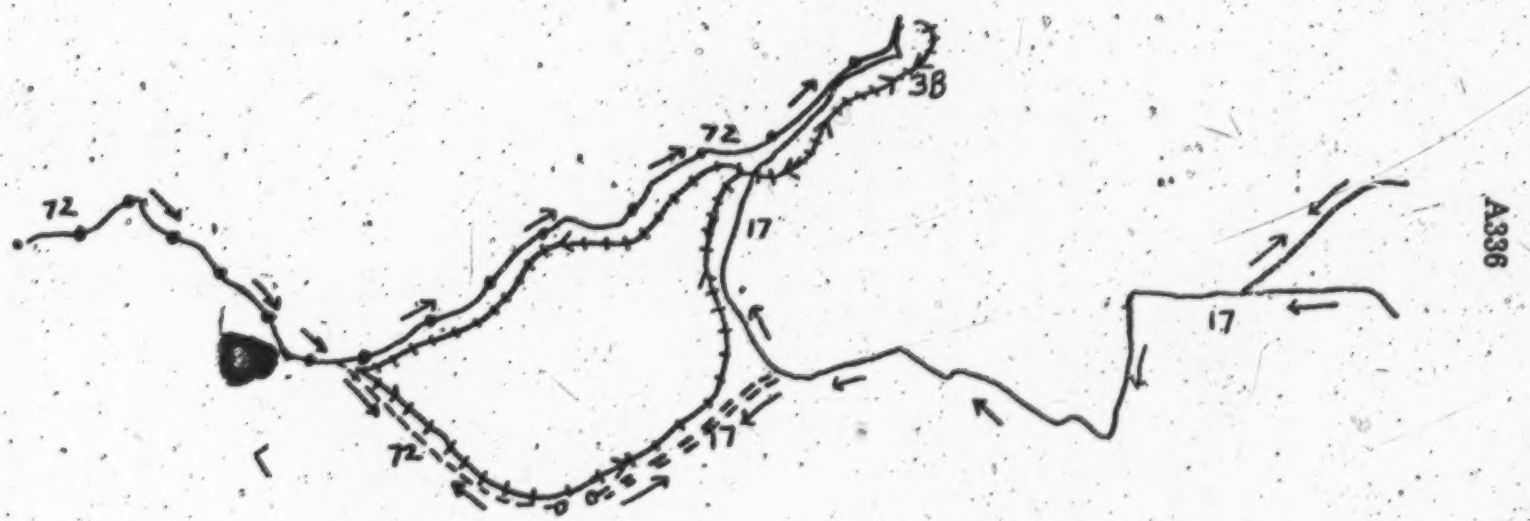
AUTAUGA COUNTY



Existing Routes			Capacity	Estimated Load
54J	——	Jones (W)	54	19
6J	---	Jones (W)	54	36
27NS	—•—	New Salem (N)	54	66
25T	++++	New Salem (N)	54	60 #

only part of load applies to New Salem

CHILTON COUNTY



Route 3B +++++ To Be Eliminated
Present Route 72 ●——●——●
Present Route 17 ————

Proposed Addition To Route 72 - - -
Proposed Addition To Route 17 = = =

4. *Chambers County*

Twenty-one buses in Chambers County serve more than one school, but none carries students of both races to schools of both races. The routes in their present form suggest extensive duplication of routes serving Five Points High and Phillips High in Five Points. For example, bus 46 and 98 A together transport only 64 students, and in one area they traverse the same roads. Routes 2 and 99 north of Five Points serve the same area; one takes students to a Negro school, while the other transports students to a predominantly white school. Likewise, routes 24 and 52 traverse much of the same area but are assigned to separate schools based on race. None of these buses serve predominantly white and Negro schools, but only one or the other.

In the most heavily populated area, in the southeast corner of the County referred to as the Chattahoochee Valley, there are six predominantly white and two predominantly Negro schools served by 19 buses of which 12 serve only white schools and seven serve only Negro schools. No buses serve both white and Negro schools with the exception of bus 95 which in its first two trips transports Negro students to all Negro Drew and Rehobeth schools and on its third trip transports ten Negro students to predominantly white Fairfax Junior High and Valley High School. All but two of the 19 buses make at least two trips; four make three trips; and one makes four trips. The map as submitted suggested that transportation in this congested area could be more economically utilized by buses serving schools of more than one race. Further, routes 13 A and 53 B transport white students residing in Chambers County to the Lanett City school system. Negro students residing in the area served by 13 A and 53 B attend either Drew Junior High or Rehobeth schools operated by the County.

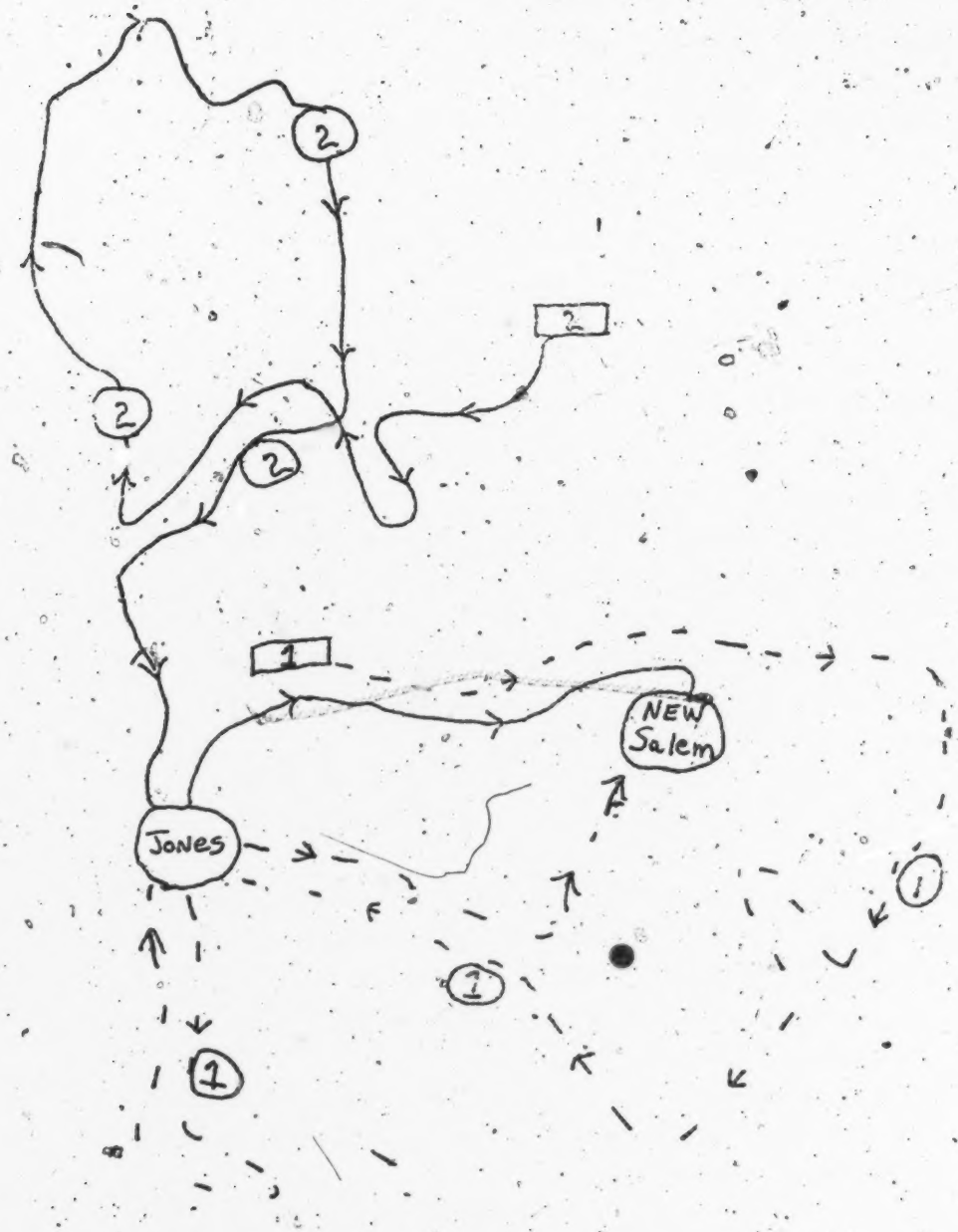
5. *Chilton County*

There are 63 bus routes planned for operation in Chilton County during the 1967-68 school year. Of these, ten transport only Negro students and stop only at schools attended solely by Negro children. The remaining 53 buses carry all the County's white children (who ride buses) and between four and ten Negro children who attend predominantly white schools. None of these 53 buses stop at a school attended predominantly by Negro children.

Overlapping "white" and "Negro" bus routes exist in several areas of the County, particularly in the Maplesville, Verbena and Clanton areas. For example, bus No. 3 B (all Negro) parallels part of the route of bus No. 72 (predominantly white) and part of the route of bus No. 17 (predominantly white). As shown in the diagram on the next page, the route of bus 3 B could be eliminated entirely without substantial difficulty.

A339

AUTAUGA COUNTY



PROPOSED Routes

1 — JONES - New Salem

2 -- JONES - New Salem

6. *Limestone County*

Thirty buses in Limestone County serve more than one school, but none serves both a predominantly white school and a predominantly Negro school. The routes in their present form suggest extensive duplication based on race in the Mooresville-Belle Mina area. Routes 41 and 36 serve Negro and white schools respectively. They parallel each other, but neither will, as presently proposed, serve both Negro and white schools. White high school students in this area are transported to Tanner and Negro high school students to Trinity High in Athens, in significant part along the same roads.

In the Elkmont area, bus 61 transports Negro students to the all Negro Elkmont Elementary School and Negro high school students to Trinity High in Athens. Buses 48 and 67 transport students to the predominantly white Limestone County High in Elkmont. Reorganization of these three routes to serve both predominantly white and predominantly Negro schools is necessary to eliminate uneconomical duplication based on race.

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 1967, I served the foregoing Motion for More Specific Relief Implementing Section III of the Court's Decree of March 22, 1967, and Report of the United States upon Transportation Routes, Criteria, and Letters Transmitted to the Court by the State Superintendent of Education to which this is attached upon each party in this case by sending by United States mail

a copy thereof, postage prepaid, to each attorney of record as follows:

Honorable Hugh Maddox
Legal Advisor to the Governor
State Capitol
Montgomery, Alabama 36104

Goodwyn, Smith and Bowman
Attorneys at Law
325 Bell Building
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Honorable MacDonald Gallion
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State Capitol
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Attn: Gordon Madison
Assistant Attorney General

Mr. Fred D. Gray
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Mr. Melvin Zaar
NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle
New York, New York 10019

/s/ Kenneth P. Frankland
Attorney
Department of Justice

APPENDIX 31

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE, et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and Amicus Curiae,

v.

MACON COUNTY BOARD OF EDUCATION, et al.,
Defendants.

Motion of the United States for an Order Requiring State Superintendent Ernest Stone to Further Implement Section VI of the Decree of March 22, 1967

The United States, Plaintiff-Intervenor and Amicus Curiae, herein moves the Court for an order requiring the defendant Ernest Stone as State Superintendent of Education to take the following action to further implement Section VI of the Decree of March 22, 1967:

1. The State Superintendent should prepare a further and more detailed proposed plan for equalization in accordance with the requirements of the Decree and should submit such plan to this Court no later than August 15, 1967. The proposed plan should include an itemized inventory of all existing inequalities between schools attended predominantly by Negro children and schools attended predominantly by white children in each of the 99 systems named in the Decree. This itemized inventory shall be under the following categories as set forth in the Decree and in the Court's model plan: Physical Facilities, Equipment, Services, Courses of Instruction, Instructional Ma-

terial, Pupil-Teacher Ratios, Pupil-Classroom Ratios, Survey Classification of Buildings and Sites, Per-Pupil Expenditures, Valuation of School Property, Library Books Per Pupil, Accreditation, and Transportation. If, with respect to any particular category, it is impossible to submit a full report by August 15, 1967, the report of the State Superintendent should describe in detail his plans for completing such inventory and the earliest date on which he can submit the additional information to the Court.

2. With respect to each of the school systems in which there are any of the inequalities between schools heretofore maintained for Negro students and those maintained for white students, the State Superintendent, in co-operation with the officials of such system shall prepare a detailed plan for the correction of such inequalities and shall submit a copy of such plan together with a description of the steps taken to implement such plan to the Court no later than November 1, 1967.

This motion is made upon the following grounds:

1. On July 6, 1967, the defendant Ernest Stone as State Superintendent of Education, pursuant to Sections VI and VII of the Decree of this Court of March 22, 1967, submitted his proposed plans to equalize all physical facilities, equipment, services, courses of instruction, and instructional materials.

2. The proposed plan fails to meet the requirements of this Court's Decree, as more fully appears in the Report of the United States and Objections to the Proposed Plan for Equalization, which is attached hereto and made a part hereof.

This motion is based upon the proposed plan of equalization filed with this Court by the defendant Ernest Stone, July 6, 1967, upon the Order of March 22, 1967, up-

on the attached report of the United States, and upon the pleadings, documents, and evidence heretofore filed or submitted in this case.

Respectfully submitted,

John Doar
Assistant Attorney General
Ben Hardeman
United States Attorney
St. John Barrett
/s/ John M. Rosenberg
Attorneys
Department of Justice

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE, et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and Amicus Curiae,

v.

MACON COUNTY BOARD OF EDUCATION, et al.,
Defendants.

Report of the United States Upon, and Objections To, the Proposed Plan for Equalization of Physical Facilities, Equipment, Services, Courses of Instruction, and Instructional Materials.

The United States herein reports upon, and objects to, the proposed plan for equalization of physical facilities, equipment, services, courses of instruction, and instructional materials filed by Dr. Ernest Stone as State Superintendent of Education on July 6, 1967.

Section VI of the Decree of this Court on March 22, 1967, required that the State Superintendent of Education develop and submit to the Court "a detailed program for bringing the quality of physical facilities, equipment, services, courses of instruction, and instructional materials of schools previously maintained for Negro students up to the level in schools previously maintained for white students." The Decree further provided that this program "eliminate those disparities in different pupil-teacher ratios, survey classifications of buildings, per pupil expenditures, valuation of school property, library books per pupil, course offerings, accreditation, and transportation." It was further

required that in connection with applications for teacher units for vocational teachers or teachers of exceptional children, the State Superintendent would consider and grant those applications, otherwise satisfying educational requirements, which had been submitted before March 22, 1967, on behalf of schools traditionally maintained for Negro students prior to acting upon other applications for such units.

The proposed plan of the State Superintendent submitted in response to the requirements of Section VI of the Decree consists of 15 numbered paragraphs.

Paragraphs 1, 2, 3, and 4 of the Superintendent's proposed plan repeat the language of Section III of the model desegregation plan appended to the Decree with the addition only of some language in paragraph 4 which describes more specifically the programs and services intended to be covered by the phrase "special educational programs and services".

Paragraphs 5, 6, 7, and 8 of the Superintendent's proposed plan essentially repeats the language of Section IV of the Court's model plan. These paragraphs, however, omit the requirement of the model plan that there be equalization of pupil-classroom ratios, although it includes the requirement that there be equalization of pupil-teacher ratios.

In paragraph 5 of the Superintendent's proposal and again in paragraph 9, there is provided that no "new" state or federal funds will be used for materials, equipment or maintenance of predominantly white schools until all schools are brought up to the standard of such schools.

Paragraphs 10 and 11 of the present proposal repeat the language of Section V of the Court's Model Plan with

the exception that these paragraphs omit the last sentence of Section V of the Model Plan which reads "The school board will not fail to consolidate schools because desegregation would result." The language of sections 12, 13 and 14 of the Superintendent's proposed program is not drawn specifically from any provision of the Court's Model Plan or of the Decree. These sections read as follows:

> 12. State accreditation for both Elementary and Secondary schools shall be applied to those previously predominate Negro schools until there is a proportional number of accredited previously predominate Negro schools as compared with accredited previously predominate white schools based on present standards.
>
> 13. Supervision shall be provided to all schools on a comparable basis.
>
> 14. As new school buses are purchased, they shall be allocated to predominantly Negro schools on the same proportional basis as they are to predominantly white schools.

Paragraph 15 of the proposed plan repeats the language of the last sentence of Section VI of the Decree regarding allocation of teacher units for vocational teachers and teachers of exceptional children.

The United States objects to the proposed plan of the State Superintendent of Education on the following grounds:

1. The proposed plan does not meet the requirements of this Court's Order in that it is not a detailed program for the actual accomplishment of the equalization of the facilities, equipment, services, curriculum, and materials in each school system but is a restatement of the language of this Court in its Decree and Model Plan without any specific program for implementing such language.

2. Paragraphs 5, 6, 7, and 8 restate the language of this Court in Section IV of the Model Plan, but omit the requirement of the equalization of "pupil-classroom ratio".

3. Paragraph 5 of the proposed plan, in providing that prompt steps shall be taken to provide physical facilities, equipment and instructional materials in schools heretofore maintained for Negro students equal to those provided in schools previously maintained for white students, requires only that new federal and state funds shall be used preferentially to ungrade predominantly Negro schools but fails to make this requirement applicable to local funds, and also fails to provide for the redistribution of existing facilities, equipment and materials to correct the disproportionate allocations of the past.

4. Paragraph 12 of the proposed plan is ambiguous. If it is intended that the State's accreditation will be given to predominantly Negro schools until the proportion of Negro schools that are accredited is the same as the proportion of white schools that are accredited, but without regard to whether the facilities and the program in the Negro schools has actually been improved sufficiently to meet the standards met by the white schools, then this paragraph misapplies the equalization requirements of the Decree.

5. Paragraph 14 of the proposed plan in providing that newly purchased school buses should be allocated between predominantly Negro schools and predominantly white schools on a proportionate basis fails to provide that existing inequalities resulting from a disproportionate allocation in the past should be corrected.

Respectfully submitted,

John Doar
Assistant Attorney Gneral
Ben Hardeman
United States Attorney
St. John Barrett
/s/ John M. Rosenberg
Attorneys
Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 1967, I served the foregoing Motion of the United States for an Order Requiring State Superintendent Ernest Stone to Further Implement Section VI of the Decree of March 22, 1967, and Report of the United States Upon, and Objections To, the Proposed Plan for Equalization of Physical Facilities, Equipment, Services, Courses of Instruction, and Instructional Materials to which this is attached upon each party in this case by sending by United States mail a copy thereof, postage prepaid, to each attorney of record as follows:

Honorable Hugh Maddox
Legal Advisor to the Governor.
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Montgomery, Alabama 36104

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Honorable MacDonald Gallion
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10 Columbus Circle
New York, New York 10019

/s/ Kenneth P. Frankland
Attorney
Department of Justice

APPENDIX 32

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE, et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and Amicus Curiae,

v.

MACON COUNTY BOARD OF EDUCATION, et al.,
Defendants.

Answer of the United States As to Why the Marengo County School Officials Should Not Be Dismissed As a Defendant

The United States, Plaintiff-Intervenor and *amicus curiae* in response to this Court's Order of July 13, 1967, answers that the Marengo County school officials should not be dismissed as defendants in this cause at this time for the following reasons:

1. On June 8, 1967, in response to this Court's Order to Show Cause dated May 26, 1967, the Marengo County Board of Education adopted a plan of desegregation which contained a faculty desegregation provision which varied from the provision contained in the model plan attached to the Court's Decree of March 22, 1967, in that the phrase "if possible" was added. Counsel for the Marengo County Board of Education stated to the Court at the hearing on June 9, 1967, that the variation did not alter the Board's responsibilities. On June 14, 1967, the Marengo County defendants were ordered to report to the Court within 15 days the specific steps taken by them and the results

achieved to implement their faculty desegregation plan, said report to include information regarding reassignment of teachers now assigned to schools to be closed this year.

2. By letter dated June 22, 1967, the Marengo County Board of Education reported to the Court that they were unable to report positive assignments of faculty members in desegregated situations and requested an extension until July 15, 1967, to make such a report. The June 22 letter stated that a majority of the Negro teachers and all the white teachers in the Marengo County System had been contacted in an attempt to obtain voluntary transfers.

3. By supplemental report to this Court filed July 13, 1967, the Marengo County defendants stated that three Negro teachers from within the system have agreed to teach at two predominantly white schools and one white teacher from inside the system has agreed to teach at the all Negro Marengo High School.

4. For the 1967-68 school year, the Marengo County Board of Education will operate 14 schools, two attended predominantly by white students and 12 attended only by Negro students.

5. As of this date the Marengo County defendants have not shown cause as ordered on May 26, 1967, as amended on June 14, 1967, as to each teacher presently employed why that teacher cannot be assigned for the 1967-68 school year to a school traditionally attended by students and staffed by teachers of the opposite race.

6. Superintendent Ramsey has made a good faith effort to solicit voluntary transfers of teachers to schools in which the majority of the faculty members are of a race different from that of the teachers to be transferred. All white teachers have been contacted at least twice and each has filled out a questionnaire declining to accept transfer to a school of the opposite race at this time. A

blank copy of the form is incorporated as Attachment A. The Superintendent has satisfactorily represented that applicants for teaching positions in Marengo County have been advised that if employed, the teacher may be assigned to a school of the opposite race. With that understanding, the Marengo County Board of Education has employed one new white teacher for an all Negro school and is continuing to interview applicants. The Superintendent has represented that there are vacancies at the all Negro schools and that white applicants are being sought for these positions before they will be filled by new or presently employed Negro teachers.

7. In order to fulfill the Board's affirmative responsibility as stated in their desegregation plan and filed with this Court that, "the school board will take affirmative steps to accomplish the desegregation of its school faculties," it is necessary that some additional assignment and transfer of teachers from within the system be made. In this regard, the desegregation plan of the Marengo County Board of Education, states that, "teachers, principals and staff members will be assigned to schools so that the faculty and staff is not composed exclusively of members of one race, *if possible.*" This Court was advised by the Board's counsel that the inclusion of the last phrase, "if possible," did not change the substance of their obligation.

In view of the foregoing, the United States takes the position that these steps by the Marengo County school officials toward achieving faculty and staff desegregation for the 1967-68 school year do not meet the standards embodied in this Court's Decree, and that pending further efforts on their part in this regard, the Marengo County school officials should be retained as defendants in this action.

This report is based upon the record in this case and the affidavit of Kenneth P. Frankland which is attached hereto.

Respectfully submitted,

John Doar
Assistant Attorney General
Ben Hardeman
United States Attorney
Kenneth P. Frankland
Attorney
Department of Justice

ATTACHMENT A

June ....., 1967

I have met with the Superintendent of Education of Marengo County Schools, Fred D. Ramsey, this day and he has asked me to accept an assignment to a school which is all or predominantly Negro in its faculty and student body. This is the second such conference I have had with Superintendent Ramsey since he asked for volunteers in an open meeting on March 28, 1967.

After receiving this request from Superintendent Ramsey, I do hereby answer in the following way:

.....accept

.....accept with reservation

.....decline

.....decline with reservation

Sincerely,

.....

.....
Notary Public

AFFIDAVIT

STATE OF ALABAMA)
)
COUNTY OF MONTGOMERY)

KENNETH P. FRANKLAND, being first duly sworn says:

I am an Attorney for the United States of America assigned to the case of *Lee, et al.* v. *Macon County Board of Education, et al.*, Civil Action No. 604-E and as part of my assignment I have examined and I am familiar with the exhibits and reports in this case pertaining to Marengo County. On July 31, 1967, I contacted Mr. Fred Ramsey, Superintendent of Schools for Marengo County and several teachers presently employed in Marengo County in order to evaluate the supplemental report filed with this Court on July 13, 1967, by Superintendent Ramsey. On the basis of these conversations, I am informed and believe that:

1. For the 1967-68 school year, the Marengo County Board of Education will operate 14 schools, two attended predominantly by white students and 12 attended only by Negro students.

2. Three Negro teachers from within the system have agreed to transfer to predominantly white schools and one white teacher from outside the system has agreed to teach at the Negro Marengo High School.

3. Mr. Ramsey stated that he has contacted all the white teachers and almost all the Negro teachers to solicit

voluntary transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.

4. All white teachers have been contacted by Mr. Ramsey at least twice and each has filled out a form, a copy of which is attached to the report to which this affidavit is attached, indicating that they have declined to transfer at this time.

5. Mr. Ramsey stated that all new applicants for teaching positions in Marengo County have been advised that if employed, the teacher may be assigned to a school whose faculty is predominantly of the opposite race of the teacher. Mr. Ramsey stated that he is continuing to interview and attempting to fill vacancies in predominantly Negro schools with white teachers. There are no vacancies at present in the predominantly white schools.

Kenneth P. Frankland.

Sworn to and subscribed before me this ___ day of August, 1967.

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 1967, I served the foregoing Answer of the United States as to Why the Marengo County School Officials Should Not Be Dismissed as a Defendant to which this certificate is attached upon each party in this case by sending by United States Mail a

copy thereof, postage prepaid, to each attorney of record as follows:

Lloyd and Dining
Attorneys at Law
Lloyd and Dining Building
Demopolis, Alabama 36104

Honorable Hugh Maddox
Legal Advisor to the Governor
State Capitol
Montgomery, Alabama 36104

Goodwyn, Smith and Bowman
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325 Bell Building
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Mr. John Satterfield
Attorney at Law
Post Office Box 466
Yazoo City, Mississippi 39194

Honorable MacDonald Gallion
Attorney General
State of Alabama
State Capitol
Montgomery, Alabama 36104

Attn: Gordon Madison
Assistant Attorney General

Mr. Fred D. Gray
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Mr. Melvin Zaar
NAACP Legal Defense and
Educational Fund, Inc.
10 Columbus Circle
New York, New York 10019

Kenneth P. Frankland
Attorney
Department of Justice

APPENDIX 33

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE, et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION, et al.,
Defendants.

Order

(Filed August 2, 1967)

The United States, plaintiff-intervenor and amicus curiae, by motion filed this date, asks this Court for an order requiring the defendant Dr. Ernest Stone, as State Superintendent of Education, to take certain action to further implement Section III of the Decree of this Court made and entered herein on March 22, 1967.

Upon consideration of the motion, the order made and entered herein on March 22, 1967, and the material filed with this Court pursuant to said order, relating to bus transportation in the schools affected by said order, it is the ORDER, JUDGMENT and DECREE of this Court that Dr. Ernest Stone, State Superintendent of Education:

1. Require each of the following school systems to supplement the information it has furnished the State Superintendent with respect to bus transportation in the following manner:

a. The Tuscaloosa City School system should inform the State Superintendent as to each bus in its system, of its capacity, the number of white students and Negro students to be transported, the number of miles traveled one way, and the school or schools to be served;

b. The Lamar County school system should inform the State Superintendent as to each bus in its system, of the expected number of white students and Negro students to be transported and of the school or schools to be served;

c. The Conecuh County and the Escambia County systems should inform the State Superintendent as to each bus in their respective systems, of the expected number of white students and Negro students to be transported; and

d. Each of the school systems listed below should inform the State Superintendent as to each bus in its system, of the expected number of white students and Negro students to be transported and of the school or schools to be served (if any) in addition to the terminal school previously reported:

Alexander City
Anniston
Attalla
Autauga County
Baldwin County
Bibb County
Blount County
Brewton
Butler County
Calhoun County
Chambers County
Cherokee County
Chilton County
Clarke County
Geneva County
Greene County
Henry County
Houston County
Jackson County
Lauderdale County
Lee County
Limestone County
Marengo County
Marion County
Marshall County
Monroe County
Morgan County
Pickens County

Clay County	Pike County
Cleburne County	Randolph County
Coffee County	Russell County
Colbert County	St. Clair County
Coosa County	Shelby County
Covington County	Sumter County
Cullman County	Sylacauga
Dale County	Talladega City
Dallas County	Talladega County
DeKalb County	Tallapoosa County
Elmore County	Tuscaloosa County
Etowah County	Walker County
Fayette County	Washington County
Franklin County	Winston County

2. Approve or disapprove the proposed bus transportation routes, criteria governing the availability of bus transportation, and the letters to parents concerning bus transportation submitted by each school system, as required by the Decree of March 22, 1967.

3. Require, with respect to those systems whose routes, criteria, or letters to parents he disapproves, of each such system that it submit routes, criteria, or letters meeting the standards of its desegregation plan, which the State Superintendent has previously submitted to this Court.

4. Report to this Court no later than August 15, 1967, the results of the action required herein. The report shall include a description of all overlapping and duplicative bus routes based on race heretofore maintained that have been eliminated as a result of the efforts of the State Superintendent pursuant to the provisions of the Decree of March 22, 1967. If any such routes have not been eliminated, they should be specifically referred to in the report

and the reasons given why they cannot or have not been eliminated.

One member of this Court, the Honorable H. H. Grooms, United States District Judge, being unavailable, this order is entered with the specific concurrence of the Honorable Richard T. Rives, United States Circuit Judge.

Done, this the 2nd day of August, 1967.

/s/ Frank M. Johnson, Jr.
United States District Judge

APPENDIX 34

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 604-E

ANTHONY T. LEE, et al.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor and Amicus Curiae,

vs.

MACON COUNTY BOARD OF EDUCATION, et al.,
Defendants.

Order

(Filed August 2, 1967)

The United States, plaintiff-intervenor and amicus curiae, by motion filed this date, asks this Court for an order requiring the defendant Dr. Ernest Stone, as State Superintendent of Education, to take certain action to further implement Section VI of the Decree of this Court made and entered herein on March 22, 1967.

Upon consideration of the motion, the report of the United States attached thereto and the report of the State Superintendent of Education filed with this Court on July 6, 1967, this Court is of the opinion that the motion as now presented should be granted.

It is, accordingly, ORDERED that Dr. Ernest Stone, State Superintendent of Education, take the following action to further implement Section VI of the Decree of this Court made and entered herein on March 22, 1967:

1. The State Superintendent should prepare a further and more detailed proposed plan for equalization in ac-

cordance with the requirements of the Decree and should submit such plan to this Court no later than August 15, 1967. The proposed plan should include an itemized inventory of all existing inequalities between schools attended predominantly by Negro children and schools attended predominantly by white children in each of the 99 systems named in the Decree. This itemized inventory shall be under the following categories as set forth in the Decree and in the Court's model plan: Physical Facilities, Equipment, Services, Courses of Instruction, Instructional Material, Pupil-Teacher Ratios, Pupil-Classroom Ratios, Survey Classification of Buildings and Sites, Per-Pupil Expenditures, Valuation of School Property, Library Books Per Pupil, Accreditation, and Transportation. If, with respect to any particular category, it is impossible to submit a full report by August 15, 1967, the report of the State Superintendent should describe in detail his plans for completing such inventory and the earliest date on which he can submit the additional information to the Court.

2. With respect to each of the school systems in which there are any of the inequalities between schools heretofore maintained for Negro students and those maintained for white students, the State Superintendent, in cooperation with the officials of such system shall prepare a detailed plan for the correction of such inequalities and shall submit a copy of such plan together with a description of the steps taken to implement such plan to the Court no later than November 1, 1967.

One member of this Court, the Honorable H. H. Grooms United States District Judge, being unavailable, this order is entered with the specific concurrence of the Honorable Richard T. Rives, United States Circuit Judge.

Done, this the 2nd day of August, 1967.

/s/ Frank M. Johnson, Jr.
United States District Judge

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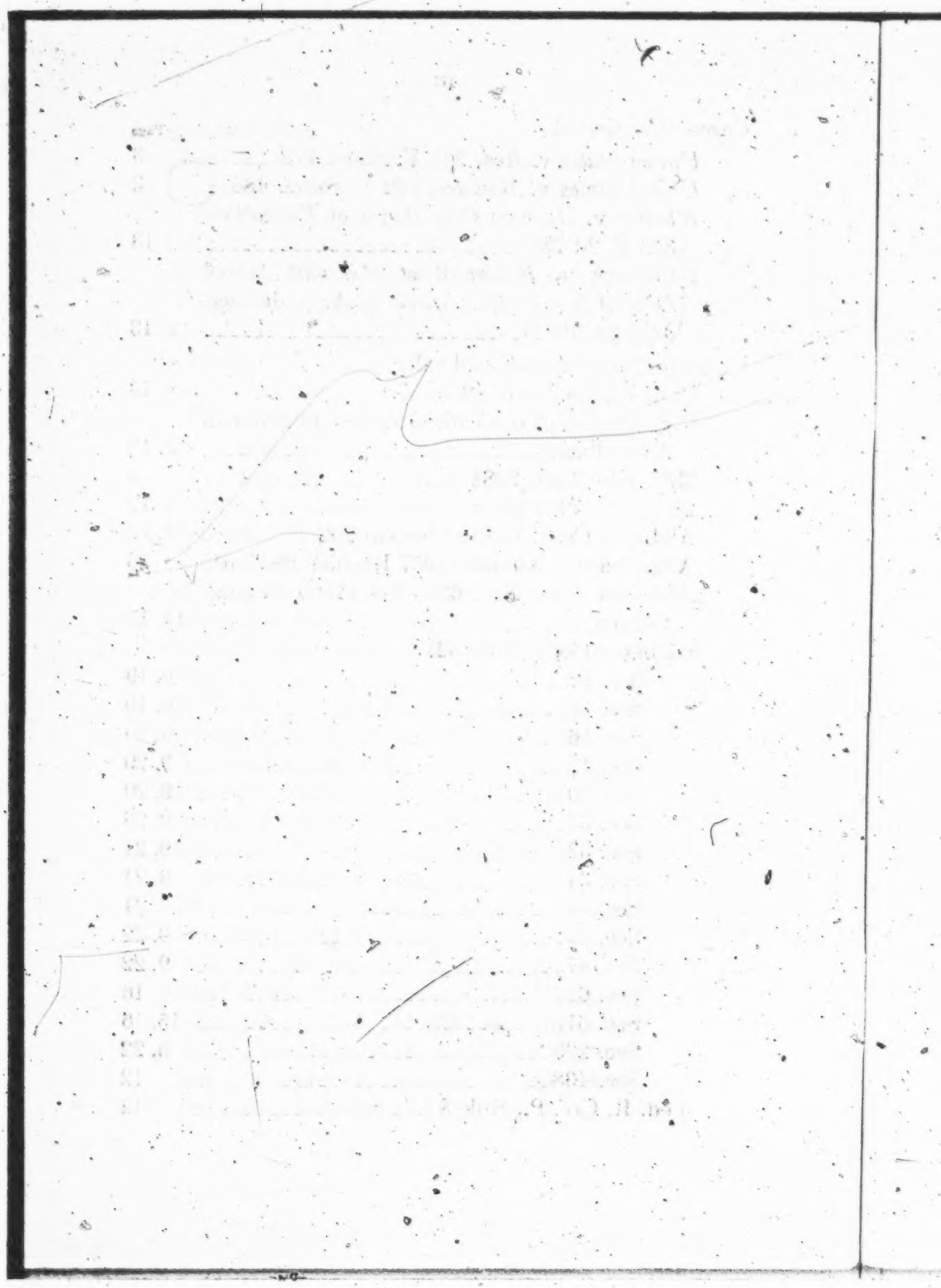

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 489

LURLEEN BURNS WALLACE ET AL., APPELLANTS

v.

ANTHONY T. LEE, ET AL., AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, the United States moves that the judgment of the district court entered on March 22, 1967, be affirmed.

OPINIONS BELOW

The opinion of the three-judge district court supporting the decree from which this appeal is taken (J.S. A27–A67) is reported at 267 F. Supp. 458. Prior opinions in the case are reported at 231 F. Supp. 743 and at 221 F. Supp. 297.

JURISDICTION

The judgment of the three-judge district court (J.S. A1–A26) was entered on March 22, 1967. A no-

tice of appeal was filed on April 7, 1967. The time for filing the Jurisdictional Statement was extended by the district court to August 14, 1967, and it was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether the district court was correct in granting relief against the State Superintendent of Education, the Governor and the State Board of Education, requiring them to exercise their authority to effect desegregation in public school systems throughout the State, when local school authorities were not parties to the suit.

2. Whether the district court correctly defined the constitutional obligation of the State to disestablish the dual racial school system.

3. Whether the district court correctly found the Alabama tuition grant law unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Alabama law cited in this motion are set forth in the appendix hereto.

STATEMENT

The Procedural History. This class action was originally filed on January 28, 1963, by Negro parents of school-age children of Macon County, Alabama,

against the public school officials of the county. On July 16, 1963, by order of the district court, the United States was made a party and *amicus curiae* in order that "the public interest in the administration of justice would be represented" (J.S. A29). The district court entered a preliminary injunction on August 22, 1963, observing that "it appears that the defendants are at the present time ready and willing to start immediately in the desegregation of the schools of Macon County." *Lee* v. *Macon County Board of Education*, 221 F. Supp. 297, 300 (M.D. Ala.). Yet, on three separate occasions the court found it necessary to enjoin various forms of interference by State and non-defendant local officials with the desegregation of schools in Macon County.[1] And, on February 2, 1964, the private plaintiffs filed a supplemental complaint adding as defendants the Governor, the State Board of Education, and the State Superintendent of Education, asking relief against their efforts to enforce a State-wide policy of racial school segregation in the State of Alabama and seeking to enjoin as unconstitutional a State tuition grant law. At that point, a three-judge court was constituted pursuant to 28 U.S.C. §§ 2281, 2284.

[1] See *United States* v. *Wallace*, 222 F. Supp. 485 (enjoining interference by Governor George C. Wallace and officials of the Alabama State Highway Patrol); *Lee* v. *Macon County Board of Education*, Civil Action No. 604–E, February 3, 1964, R. 25–30 (restraining, upon motion of the private plaintiffs, interference by the Governor, State Superintendent of Education, and the State Board of Education); and *United States* v. *Rea*, 231 F. Supp. 772 (enjoining interference by the Mayor of Notasulga, Alabama).

On July 13, 1964, the district court concluded that "the State of Alabama has an official policy favoring racial segregation in public education," and that "[s]trictly in accord with this official policy, the State of Alabama has operated and presently operates a dual school system based upon race." 231 F. Supp. at 750. The court found that "the evidence as herein related clearly establishes a persistent course of action by the defendant State officials to interfere with and prevent the carrying out of this Court's order respecting the desegregation of the Macon County public schools, and * * * [that] State officials have in this interference acted wilfully * * *," and observed that "there must be a recognition on the part of these State officials that in the exercise of their general control and supervision over all the public schools in the State of Alabama and particularly in the allocation and distribution of State funds for school operations, they have an affirmative duty to proceed with 'deliberate speed' in bringing about the elimination of racial discrimination in the public schools of this State." 231 F. Supp. at 753, 756. The court accordingly enjoined the defendant State officials from interfering with the elimination of racial discrimination by local school officials in Macon County or in any school district in the State of Alabama, from implementing the Alabama tuition grant law, and from (R. 494):

> Failing, in the exercise of its control and supervision over the public schools of the State, to use such control and supervision in such a manner as to promote and encourage the elimi-

nation of racial discrimination in the public schools, rather than to prevent and discourage the elimination of such discrimination.

In August 1966, the district court permitted the United States to file a supplemental complaint in intervention attacking the validity of a new Alabama tuition grant statute, and in September and November of the same year the private plaintiffs filed supplemental complaints for further State-wide desegregation relief, alleging, *inter alia*, that the Governor had continued to interfere with public school desegregation in Alabama since July 13, 1964. Following extensive discovery by all parties, the case was heard on November 30–December 2, 1966. Post-trial briefs were then submitted and oral argument heard on February 3, 1967. On March 22, 1967, the district court entered the order from which this appeal is taken, granting supplemental State-wide desegregation relief, and declaring the 1965 tuition grant statute unconstitutional. This Court denied a stay of that decision on May 22, 1967. 387 U.S. 916.

The district court's decision. The district court found that the defendant Alabama State officials, particularly the Governor and State Superintendent of Education, had continued to use their power and positions to promote public school segregation and to defeat the desegregation efforts of local school systems. There were many instances of unusually direct interference; telegrams and letters from the Governor and State Superintendent to local superintendents who had adopted desegregation plans which went "beyond the * * * minimum requirements of the law," meetings

called by the Governor, pressure on local school boards to retreat from faculty desegregation plans, and offers to provide State funds to hire additional teachers for students who would otherwise be taught by a teacher of a different race. But, according to the district court, "the most significant action by these defendant state officials, designed to maintain the dual public school system based upon race, is found in the day-to-day performance of their duties." (J.S. A40–A48.)

Thus, the State Department of Education, in conducting surveys of local school systems and making recommendations with respect to the location, construction, consolidation, capacity, physical condition, and site and building size of schools, has sought to perpetuate the dual system of white and Negro schools. So, also, the appellants have taken no steps to eliminate the segregation of teacher institutes. In-service teacher training programs and teacher certification were still being used to enforce segregation. Nor have the appellants attempted to desegregate school transportation systems or to eliminate gross inequalities between busses used for transporting white students and those used for transporting Negro students, despite extensive statutory State control over, and almost total State financial support of, the local transportation systems.[2] And, finally, trade schools and junior colleges, under the direct control of the appellants, continued to be operated on a segregated basis (J.S. A48–A59).

On the basis of these findings, the district court

[2] See Ala. Code, Title 52, § 209.

granted a permanent injunction against interference with local desegregation, and ordered the appellants to use their authority in specific ways to promote and encourage the disestablishment of the dual racial school system throughout Alabama and to notify the local school boards in the 99 school districts not already involved in school desegregation litigation that they were required to adopt a desegregation plan meeting the standards set forth in a model plan attached to the court's decree (J.S. A2–A10).

The desegregation plan (J.S. A13–A26) is based upon the "freedom of choice" method—the method most public schools in the South have used to begin desegregation of their school systems—under which school attendance assignments are determined by the choice of students and parents. It follows, in all significant respects, the model decree formulated by the Court of Appeals for the Fifth Circuit in *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, affirmed on rehearing, March 29, 1967, pending on petitions for certiorari, Nos. 256 and 301, this Term. Section I of the plan provides that all grades will be desegregated commencing with the 1967–68 school year and sets forth the mechanics governing the exercise of a choice, stating who may exercise a choice, when it is to be exercised, how students and the public are to be notified, how priorities are to be determined when the number of choices exceeds available space in a particular school, and providing for non-racial assignment of students who do not exercise a choice. Section II provides that students newly entering the school system are to have

a free choice. Section III prohibits racial discrimination in services, facilities, activities and programs of the school system, and Section IV obliges the school boards to equalize the schools traditionally maintained for Negroes. The plan also has provisions respecting school transportation (Section I), school construction and consolidation (Section V), and faculty assignments (Section VI). Finally, provision is made in Section VII of the plan—and in the decree itself (J.S. A10–A12)—for submitting reports to the State Superintendent and the district court so that the court and the parties will be able to determine how the decree is being carried out.

In addition, the district court found the 1965 Alabama tuition grant statute was an attempt to promote and finance a private, segregated school system (J.S. A59–A63) and enjoined its implementation as unconstitutional (J.S. A12–A13).

ARGUMENT

1. Appellants complain that the decree was against them alone, State-wide officials, instead of against the local school authorities whose systems are to be affected by the order. In the circumstances, that was wholly appropriate.

The court below found, upon ample evidence, that the defendant State officials have long used their position and authority to encourage and promote the system of racial discrimination and segregation on a State-wide basis. Now that they have been ordered to use their powers in the opposite direction, it ill becomes them to deny their jurisdiction. Nor is there any

doubt that, as the court below found, "the defendant officials have extensive powers over [the State] public school system" (J.S. A38).[3] At all events, the exact boundaries of that authority as a matter of State

[3] Section 262 of the Alabama Constitution provides that: "The supervision of the public schools shall be vested in a superintendent of education, whose powers, duties, and compensation shall be fixed by law." The Legislature has created the State Board of Education and has provided in section 14 of Title 52 of the Alabama Code that it "shall exercise, through the state superintendent of education and his professional assistants, general control and supervision over the public schools of the state * * *." The Legislature has further provided that "The state superintendent of education shall execute the educational policies of the state board of education" (Ala. Code, Title 52, § 45).

The State Board is expressly authorized to adopt rules and regulations governing school construction, school sanitation, and physical examination of school children, and must enforce all rules relating to "school health, compulsory education and child conservation" (Ala. Code, Title 52, § 15). It controls the grading and standardizing of public schools (Ala. Code, Title 52, § 16), the minimum contents of courses of study (Ala. Code, Title 52, § 17), and the training and certification of teachers (Ala. Code, Title 52, § 20).

The State Board is charged with the duty of "equalizing public school facilities throughout the State" and administers a fund for that purpose (Ala. Code, Title 52, § 33). The State Board and the State Superintendent together exercise a broad power of review of actions of local boards and local superintendents in "matters relating to finance, and other matters seriously affecting the educational interest" (Ala. Code, Title 52, §§ 34 and 47).

To assist it in carrying out its express powers, the Legislature has granted the State Board a general rulemaking power as follows (Ala. Code, Title 52, § 31):

> In order to meet emergencies that may arise because of any defect in the language or purpose of this title, the state board of education may make such rules and regulations as will give full force and effect to any or all of its provisions.

law does not present an appropriate issue for this Court.[4] The decree does no more than direct the defendants—who are plainly not strangers to the Alabama school systems—to employ their offices toward effectuating desegregation, as every State officer is constitutionally bound to do. See *Cooper* v. *Aaron*, 358 U.S. 1, 7; *Griffin* v. *School Board*, 377 U.S. 218, 232–233.[5]

The appellants' contention that due process of law has been denied to the local school districts and State colleges affected by the order is without merit. In an action to determine the authority or duties of government officials, it is not necessary to join as parties all

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[4] There is no merit to the appellants' contention that the Alabama Supreme Court in *Opinion of the Justices*, 276 Ala. 239, 160 So. 2d 648, determined that the appellants have no legal authority to carry out the requirements of the decree. That decision (which arose out of the crisis surrounding the desegregation of the Macon County public schools) merely denies the State Board of Education power to transfer or assign teachers or students from one public school to another—responsibilities which the decree below does not impose on the defendant State officials.

[5] The approach of the Court below is not novel. Much of the public school desegregation in the State of Delaware was accomplished by a district court order requiring the State Board of Education to promulgate regulations and adopt a plan to achieve desegregation in all public school districts in the state. *Evans* v. *Buchanan*, 152 F. Supp. 886 (D. Del.), affirmed, 256 F. 2d 688 (C.A. 3), certiorari denied, 358 U.S. 836. In its second affirmance of the Delaware statewide method of desegregation, *Evans* v. *Ennis*, 281 F. 2d 385, 391 (C.A. 3), certiorari denied, 364 U.S. 933, the court of appeals cited the Delaware statute (strikingly similar to Section 33 of Title 52 of the Alabama Code) making it the duty of the State Board of Education to maintain a "uniform, equal and effective system of public schools throughout the State."

persons or inferior governmental agencies that may be affected by such a determination. *Louisiana* v. *United States*, 380 U.S. 145, 151, n. 10; *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 300. Since the defendant State officials in the instant case have the authority to use their powers to promote the desegregation of local school districts without the approval of such local districts, the individual school boards have no legal claim requiring their presence as parties to an action determining the obligation of the State officials to so use their authority.

Nor does the provision of the decree directing the State Superintendent to advise local school districts that they are required to adopt a desegregation plan meeting all the standards included in the court approved plan improperly litigate the rights of the local districts behind their back. No school district is or has been directly ordered by the court to adopt a desegregation plan, or to take or refrain from any action, without being joined as a party and given an opportunity to be heard. The district court's order of June 14, 1967 (J.S. A229–A238) requiring the Marion County Board of Education, and, separately, other local boards, to adopt desegregation plans and take various specified actions to accomplish desegregation, cited by appellants to support their argument, was entered only after the particular local school boards were joined as parties and afforded a hearing, with the right to present any relevant evidence, cross-examine

witnesses, and fully represent themselves.[6] This same procedure is used whenever the court orders any action by the local school boards.[7]

2. At this late date, and against the background of efforts to frustrate the promise of *Brown* detailed in the opinion below, there can be no serious challenge to the comprehensiveness of the uniform desegregation plan formulated by the court. It is long since settled that the constitutional command to end discrimination in public education is not satisfied merely by an elimination of dual attendance zones for students. What is required is a transition from a dual system based on race to a unitary, non-racial system; a requirement obliging the boards to revise completely all aspects of the dual school systems. See *Brown* v. *Board of Education,* 349 U.S. 294, 300–301; *Bradley* v. *School Board,* 382 U.S. 103, 105; *Rogers* v. *Paul,* 382 U.S. 198, 199–200; *Northcross* v. *Board of Education of City of Memphis,* 302 F. 2d 818, 823–824 (C.A. 6);

[6] The district court has jurisdiction over any of the individual systems within Alabama under Rule 8, F.R. Civ. P. Venue lies for any of these school boards under 28 U.S.C. § 1392(a) which provides: "Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts."

[7] That part of the court's order requiring the elimination of dual attendance zones and faculty segregation at "any trade school, junior college, or state college administered by the Alabama State Board of Education" (J.S. A9), also challenged by appellants, by its own terms affects only institutions directly under the authority of the named defendant officials. See, *e.g.*, Ala. Code, Title 52, § 438: "The state board of education shall have the control and management of the several teachers colleges of the state, for white teachers, located at Florence, Jacksonville, Livingston, Troy, and of the Alabama State College for Negroes located at Montgomery."

Kelley v. *Altheimer, Arkansas Public School District No. 22*, 378 F. 2d 483 (C.A. 8); cf. *Baldwin* v. *Morgan*, 287 F. 2d 750, 754 (C.A. 5). The desegregation plan embodied in the decree below, to be adopted by school systems throughout the State, implements that principle.[8]

Appellants specifically challenge the court's plan insofar as it requires the desegregation of faculty and staff. Yet this provision is in keeping with the decisions of all the circuits, which, following this court's decision in *Bradley* v. *School Board*, 382 U.S. 103, and *Rogers* v. *Paul*, 382 U.S. 198, have uniformly held the school board obliged to disestablish segregated patterns of faculty assignments attributable to the racial allocation of faculty under the dual system. *Yarbrough* v. *Hulbert-West Memphis School District No. 4*, No. 18,693 (C.A. 8, decided July 26, 1967); *Clark* v. *Board of Education of Little Rock School District*, 369 F. 2d 661 (C.A. 8); *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 375 F. 2d 158 (C.A. 10), affirming 244 F. Supp. 971 (W.D. Okla.), certiorari denied, 387 U.S. 931; *Green* v. *County School Board of New Kent County*, No. 10,792 (C.A. 4, decided June 12, 1967); *Wheeler* v. *Durham City Board of Education*, 363 F. 2d 738 (C.A. 4); *Monroe* v. *Board of Commissioners*,

[8] The appellants' discussion of racial balance is not on point, since nothing in the decree requires any attempt to achieve a "racial balance." Nor is the decree inconsistent with any provision of the Civil Rights Act of 1964. All of the sections of that Act cited by appellants by their own terms merely delimit the coverage of the Act or particular subdivisions thereof, and do not purport to circumscribe the duties of public officials under the Fourteenth Amendment.

Nos. 17118 and 17119 (C.A. 6, decided July 21, 196); *Singleton* v. *Jackson Municipal Separate School District*, 355 F. 2d 865 (C.A. 5). Desegregation of faculty and staff is, moreover, an essential step in the elimination of the dual school system when a "freedom of choice" plan for student assignment is in effect. For the basic requirement of such a plan is that it offer each student a completely "free" choice, uninhibited by any practice—past or present—of the board based on racial segregation. See *Stell* v. *Savannah-Chatham County Board of Education*, 333 F. 2d 55 (C.A. 5), certiorari denied *sub nom. Roberts* v. *Stell*, 379 U.S. 933; *Kier* v. *County School Board of Augusta County*, 249 F. Supp. 239, 246 (W.D. Va.). This standard cannot be met where the boards continue to maintain schools identifiable as "Negro" schools or "white" schools by the racial composition of their faculty and staff. As the district court in *Kier* said (249 F. Supp. at 246):

> It is not enough to open the previously all-white schools to Negro students who desire to go there while all-Negro schools continue to be maintained as such. Inevitably, Negro children will be encouraged to remain in "their school," built for Negroes and maintained for Negroes with all-Negro teachers and administrative personnel. See Bradley v. School Bd., *supra*, 345 F. 2d 324 (dissenting opinion). This encouragement may be subtle but it is nonetheless discriminatory. * * *

3. The court below found that the Alabama tuition grant statute (Acts Nos. 687, 688, 1965 Regular Session) was "but another attempt of the State of Ala-

bama to circumvent the principles of *Brown* by helping to promote and finance a private school system for white students not wishing to attend public schools also attended by Negroes" (J.S. A60). Although it does not, on its face, speak in racial terms, its history and application show it as a transparent device by which the State seeks through purportedly private action "to accomplish what it is constitutionally forbidden to accomplish" (J.S. A59). As such, it transgresses clearly established constitutional principles. See *Griffin* v. *School Board*, 377 U.S. 218, 231-232; *Cooper* v. *Aaron*, 358 U.S. 1, 17. See, also, *Poindexter* v. *Louisiana Financial Assistance Commission*, Civil Action No. 14683 (E.D. La. August 26, 1967, stay denied by Mr. Justice Black, September 2, 1967); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 658 (E.D. La.), affirmed *per curiam*, 368 U.S. 515.

The court below quite properly analyzed the 1965 Alabama tuition grant statute in the context of its history and purpose. See *Reitman* v. *Mulkey*, 387 U.S. 369, 373. The court started with the fact that, upon the decision of this Court in the *Brown* case, Alabama responded with the Pupil Placement Act. Section 8 of that Act authorized the parent or guardian of any child attending a school where the races were commingled to terminate the child's attendance there, and provided that "such child shall be entitled to such aid for education as may be authorized by law." Title 52, § 61(8), Code of Alabama (Recompiled 1958).* This

*This section of the Pupil Placement Act was enacted as part of the program recommended by the Special Interim Committee of the Alabama Legislature, formed in 1954 to recommend proposals for delaying or avoiding racial desegregation

section was implemented two years later by a 1957 law[9] which provided that local boards of education "may, in lieu of providing a public school or schools" pay tuition grants for children in districts where the public schools have been closed. These grants were to be paid "from available school or education funds as the board shall determine to be reasonably necessary to enable such children to attend private non-denominational schools selected by their parents or guardians." In 1963, when the district court ordered the desegregation of the Macon County public schools, an all-white private school, Macon Academy, was organized in Macon County. In January 1964, the State Board of Education ordered the closing of all grades above the seventh grade at the newly to-be-desegregated Tuskegee High School in Macon County, and in February directed the Macon County Board of Education to provide students at Macon Academy with financial assistance under the 1957 tuition grant act. By its order of July 13, 1964, the district court enjoined such assistance. Then followed the present tuition grant law.

The statute was passed as an amendment to § 61(8) of Title 52 of the Alabama Code, which provided that "no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the board of education," and authorized tuition grants

in public schools. See *Lee* v. *Macon County Board of Education*, 231 F. Supp. 743, 749 n. 4 (M.D. Ala.).

[9] Act. No. 528, Regular Session 1957; § 61(7) of Title 52, Alabama Code (Recompiled 1958).

for such children. The 1965 amendment merely removed the racial purpose from the face of the statute and provided that "no child shall be compelled to attend any school when in the judgment of the parent or guardian of such child attendance in the school to which assigned will be detrimental to the physical or emotional health of such child or subject the child to hazards to personal safety." If, in these circumstances, a child applied for transfer to any other public school in the State, and was rejected, he would be eligible for a tuition grant. The maximum amount of any grant was to be the lesser of $185 per school year, or the same per pupil cost (determined under a formula based on average daily attendance) that would ordinarily have gone to the public school system attended by the child.

Upon passage of this Act in 1965, all-white private schools commenced operation in five Alabama counties and one in Birmingham, where federal courts had ordered the beginning of public school desegregation. As the court below found, "every dollar paid during the 1965–66 school year went to students enrolled in all-white private schools established when the public schools desegregated" (J.S. A62). Such grants were an important source of revenue for these schools.[11] The purpose of the formation of these pri-

[11] At one such school the tuition fees were $90 a year higher for children who received State tuition grants than for children who did not receive them, and tuition grants there totaled $6,475 in 1965–66, out of a total approximate annual operating expense of $20,000. At two other all-white private schools the grants ran approximately 10% of the annual costs that year. At Hoover Academy in Birmingham tuition grants constituted about one-sixth of the operating costs in 1965–66.

vate schools was made clear in a televised speech by the Governor before the legislature on July 26, 1966, when he urged private donations to "help people in our State who are being forced to conduct private schools because of the destruction of their public schools" (J.S. A63).

Upon substantial evidence, the court found that the transparent purpose and effect of this statute is to provide significant State support for a segregated school system. As such, it was properly enjoined.

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted.

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SEPTEMBER 1967.

APPENDIX

The following provisions of the Alabama Constitution and of Title 52 of the Alabama Code set forth the powers of the defendant State officials of the public school system of the State of Alabama:

Alabama Constitution

Section 262. The supervision of the public schools shall be vested in a superintendent of education, whose powers, duties, and compensation shall be fixed by law.

Alabama Code, Title 52

Section 14. *General powers.*—The state board of education shall exercise, through the state superintendent of education and his professional assistants, general control and supervision over the public schools of the state, except the University, the Alabama Polytechnic Institute, and the Alabama College, and shall consult with and advise through its executive officer and his professional assistants, county boards of education, city and town boards of education, superintendents of schools, school trustees, attendance officers, principals, teachers, supervisors, and interested citizens, and shall seek in every way to direct and develop public sentiment in support of public education.

Section 15. *Rules and regulations.*—The state board of education shall adopt rules and regulations for the proper construction of school buildings, for the sanitation of schools, for the physical examination of school children, and, in conjunction with other state authorities, shall see to it that the rules relating to school health,

compulsory education, and child conservation are enforced.

Section 16. *Grading and standardizing schools.*—The state board of education shall prescribe rules and regulations for the grading and standardizing of public schools.

Section 17. *Courses of study.*—The state board of education, on the recommendation of the state superintendent of education, shall prescribe the minimum contents of courses of study for all public elementary and high schools in the state, and shall fix the maximum number of books which are compulsory in each grade of the elementary schools. In every elementary school in the state there shall be taught at least reading, spelling, handwriting, arithmetic, oral and written English, geography, history of the United States and Alabama, elementary science, hygiene and sanitation, physical training, and such other studies as may be prescribed by the state board of education. English shall be the only language employed in teaching in the first six grades of the elementary schools in the state.

* * * * *

Section 20. *Teachers' training and certification.*—The state board of education, through its executive officer, shall prescribe rules and regulations, governing the training and the certification of teachers in the public schools of the state, and for the acceptance of the diplomas of the normal schools, colleges and universities of Alabama, as well as of other states, also the subjects and the standards of teachers' examinations. The state board of education with the advice of the state superintendent of education, shall have full power and authority to promulgate and adopt rules and regulations governing the issuance of professional and special certificates.

* * * * *

Section 31. *Rules necessary to make effective the law's purpose.*—In order to meet emer-

geneies that may arise because of any defect in the language or purpose of this title, the state board of education may make such rules and regulations as will give full force and effect to any or all of its provisions.

* * * * *

Section 33. *Equalization of school facilities, revolving fund.*—The state board of education is specifically charged with the duty of equalizing public school facilities throughout the state, insofar as it may be practicable; and in order to make it possible to increase the length of school terms in rural districts, and to care for that and other worthy purposes for which no adequate appropriation has been made, the said state board of education shall expend so much as it may deem proper of the amount set aside annually by legislative enactment as a revolving fund for the use of the state board of education, provided at least eighty percent of the amount appropriated, if used, shall be expended for lengthening of public school terms and otherwise bettering conditions in rural schools.

Section 34. *Review by state superintendent.*—The state board of education shall have the power and authority to promulgate rules and regulations governing the right and method of review, and disposition upon review, by the state superintendent of education of actions and orders of county and city boards of education and of county superintendents of education and city superintendents of schools in matters relating to finance and other matters seriously affecting educational interest.

* * * * *

Section 44. *Duties.*—The state superintendent of education shall explain the true intent and meaning of the school laws, and of the rules and regulations of the state board of education. He shall decide, without expense to the parties concerned, all controversies and disputes involving the proper administration of the public school system. The state superintendent of education

shall enforce all the provisions of this title, and the rules and regulations of the state board of education. He shall file charges with the state board of education, or other controlling authority and shall recommend for removal or institute proceedings for the removal of any person appointed under the provisions of this title, for immorality, misconduct in office, insubordination, incompetency, or wilful neglect of duty.

* * * * *

Section 45. *Execution of educational policy.*—The state superintendent of education shall execute the educational policy of the state board of education. He shall call and conduct conferences of county or city boards of education, county superintendents of education, city superintendents of schools, supervisors, attendance officers, principals, and teachers, on matters relating to the condition, needs and improvements of the schools.

* * * * *

Section 47. *Review of action of county and city boards.*—The state superintendent of education under rules and regulations promulgated by the state board of education, shall have the authority to review actions and orders of county and city boards of education and city superintendents of schools in matters relating to finance and other matters seriously affecting the educational interest. Upon such review the state superintendent of education shall have the power to determine from the facts the just and proper disposition of the matter. The order of the state superintendent shall be binding.

* * * * *

Section 209. *Purposes and plan of apportionment* [*of Minimum Program Fund*].—In addition to all other appropriations and apportionments of public school money now provided by law and made available for elementary and high schools there shall be apportioned and

paid to county boards of education from the minimum program fund the amounts to be determined as hereinafter provided and in accordance with regulations of the state board of education. This minimum program fund shall be used principally (1) to aid in providing at least a seven months' minimum term for all schools, and (2) to assist in the promotion of equalization of educational opportunity for all children in the public elementary and high schools. The following requirements and procedures, supplemented when necessary by regulations of the state board of education, shall govern the apportionment of the fund:

1. *Requirements for participating in the fund.*—In order for the public schools of a county, including the independent cities, to share in the apportionment of the minimum program fund, and to receive the maximum benefits therefrom, they shall meet the following conditions; * * * d. Beginning July 1, 1935, the county shall expend funds allotted for teachers' salaries in accordance with a salary schedule or schedules adopted by the county board of education and approved by the state superintendent of education, provided such salary allotments are at least equivalent to those allotted in the state minimum salary schedule. e. As soon as practicable after July 1, 1935, the county board of education shall submit to the state superintendent of education, the following: (1) A proposed county-wide building program which sets out in detail the location of all present and proposed buildings; which indicates proposed educational centers and grades to be taught at these centers, and which provides schools for all children of the county. (2) A proposed transportation program showing the proposed routing of busses and the condition of all roads to be used for transportation * * *.

2. *Determining the cost of the seven months or established minimum program.*—In determining the cost of the seven months minimum

program or whatever term may be established to be equalized, the state board of education shall proceed to find the following allowable costs for each county, including the independent cities: Teachers' salaries, transportation, current expenses other than teachers' salaries and transportation, and, capital outlay. a. The minimum program allowance for salaries of teachers shall not exceed salaries paid, and shall be determined as follows: The number of teacher units in each county, including the cities, shall be multiplied by the amount or amounts per teacher unit to be fixed by the state board of education, which amounts shall be based on the average salaries for each major classification required by the operation of the minimum salary schedule or schedules adopted by the state board of education. In determining the number of teacher units to be allowed, the state board of education shall from time to time cause an investigation to be made of current practices in regard to teacher load in various types of schools and in counties falling in different density of population groups. The basis for determining the teacher unit shall give due regard to types of schools, density of population and to other pertinent factors. If the number of elementary or high school teachers employed is less than the number of approved teacher units in any county as computed in accordance with the regulations of the state board of education, the state superintendent of education may in his discretion use the total number of teachers employed, or any intermediate number between such actual number and the number of units allowed, as explained above, in ascertaining the minimum program fund to be apportioned as provided hereinafter; provided such allowances shall be made in so far as possible on an objective basis to be established by regulations of the state board of education. In determining the salary schedule

or schedules which shall control the expenditure of funds allowed for teachers' salaries the state board of education shall from time to time cause an investigation to be made of the current practices in regard to salaries paid various employees engaged in instructional services of the several county and city boards of education, giving due consideration to the academic and professional preparation of employees, to the length of service rendered, and to the cost of living. Nothing herein shall be construed to restrain counties or cities from the use of higher salary schedules than the minimum salary schedule set up by the state board of education. b. The minimum program allowance for transportation shall be determined as follows for any county: The number of pupils transported on transportation routes approved under regulations of the state board of education shall be multiplied by an amount per pupil which is to be fixed by the state board of education and applied to counties within groups having similar density of population; provided, studies shall be made from time to time to determine whether the cost allowed per pupil or the cost unit should be changed in any or all counties. In determining the amount to be allotted for transportation no allowance shall be made for transporting pupils who live less than two miles from the school they are attending unless such pupils can be shown to be physically handicapped and to require transportation. The total amount allotted any county for transportation shall not exceed a figure determined by the state board of education in terms of the ratio between pupils transported to school and the total number of pupils attending school in that county or some similar ratio established by the state board of education. Any county which qualifies to have transportation included in its minimum program must provide busses which meet minimum standards established by

the state board of education, and must take such other steps to protect the safety of the children as are required under regulations of the state board of education. c. The minimum program allowance for current expense other than teachers' salaries and transportation shall be determined by allowing a uniform percentage to be fixed by the state board of education. In addition, any amount spent from county and local funds for vocational education, which has been approved under the regulations of the state board of education, shall be included in the minimum program. d. The amount allowed to each board of education for capital outlay in the minimum program shall be determined under regulations of the state board of education, based largely on the number of teacher units. All boards which participate in this allowance shall submit an annual building program and otherwise comply with the requirements of law and the regulations of the state board of education regarding capital outlay expenditures. e. The total cost of the minimum program in any county shall be the total allowed for teachers' salaries, for transportation, for current expenses other than salaries of teachers and transportation, and for capital outlay. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 489

GOVERNOR LURLEEN BURNS WALLACE, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; ALABAMA STATE BOARD OF EDUCATION; ERNEST STONE, Secretary and Executive Officer of Alabama State Board of Education; JAMES D. NETTLES, ED DANNELLY, MRS. CARL STRANG, FRED L. MERRELL, W. M. BECK, VICTOR P. POOLE, W. C. DAVIS, CECIL WARD and HAROLD C. MARTIN, as members of Alabama State Board of Education,

Appellants,

—v.—

ANTHONY T. LEE and HENRY A. LEE, by Detroit Lee and Hattie M. Lee, their parents and next friends; PALMER SULLINS, JR., ALAN D. SULLINS and MARSHA MARIE SULLINS, by Palmer Sullins and Della D. Sullins, their parents and next friends; GERALD WARREN BILLES and HELOISE ELAINE BILLES, by I. V. Billes, their father and next friend; WILLIE M. JACKSON, JR., by Mabel H. Jackson, his mother and next friend; WILLIE B. WYATT, JR., and BRENDA J. WYATT, by Willie B. Wyatt and Thelma A. Wyatt, their parents and next friends; NELSON N. BOGGAN, JR., by Nelson Boggan, Sr., and Mamie Boggan, his parents and next friends; WILLIE C. JOHNSON, JR., BRENDA FAYE JOHNSON and DWIGHT W. JOHNSON, by Willie C. Johnson and Ruth Johnson, their parents and next friends, and WILLIAM H. MOORE and EDWINA M. MOORE, by L. James Moore and Edna M. Moore, their parents and next friends,

and

UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM

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IN THE

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and

UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM

Appellees Anthony T. Lee *et al.*[1] respectfully move the Court, pursuant to Rule 16(1)(c) of the Rules of the Court, to affirm the judgment below, and in support thereof would show that plenary consideration of this appeal is unnecessary because the decision below is clearly correct.

Citations to Opinions Below

The decision below is reported at 267 F. Supp. 458 (M. D. Ala. 1967). An earlier, highly relevant decision of the court below in this case is reported at 231 F. Supp. 743 (M. D. Ala. 1964).

Jurisdiction

Jurisdiction of this appeal is founded upon 28 U. S. C. §1253, in that injunctive relief was sought and obtained from a three-judge district court constituted pursuant to 28 U. S. C. §§2281, 2284 against the enforcement of a statute of the State of Alabama on the ground of its federal unconstitutionality.

Question Presented

Did the court below abuse its discretion in requiring appellants to exercise their power over public education in Alabama in such a way as to implement, rather than defeat, the school desegregation decisions of this Court?

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[1] Appellees Lee *et al.* are the original plaintiffs in this case. On behalf of the class of all Negro schoolchildren in Alabama, they filed the supplemental complaint and motion requesting the court below to order the state-wide desegregation plan in issue here (see 267 F. Supp. 458, 461-62). Thus they clearly are appellees here, despite unfounded assertions to the contrary by appellants in their jurisdictional statement (see pp. 7-8, 14, 45). In the in-

Statement of the Case

This case originated in January, 1963 as a simple school desegregation case brought by the appellees, Negro children and their parents residing in Macon County, Alabama.[2] After hearing, the district judge ordered the defendant school board to begin desegregation of the county school system by September, 1963. *Lee* v. *Macon County Board of Education,* 221 F. Supp. 297 (M. D. Ala. 1963). In compliance with that order, the defendant school board assigned 13 Negro students to a white high school. On September 2, 1963, these Negro pupils were denied entrance to the white high school by Alabama state troopers acting pursuant to an executive order of Governor George C. Wallace (see 231 F. Supp. at 747). Subsequently, on September 9, 1963, state troopers again prevented entrance of the Negro pupils to the white high school—again upon the order of Governor Wallace (ibid.). The United States then applied to the district court for injunctive relief against the Governor, which was granted. *United States* v. *Wallace,* 222 F. Supp. 485 (M. D. Ala. 1963).

In January, 1964, the State Board of Education closed the desegregated high school and transferred the Negro students to an all-Negro high school (see 231 F. Supp. at 748). The district court then ordered that the Negro students be admitted to two all-white high schools (ibid.).[3]

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stant appeal, appellees Lee *et al.* have heretofore filed an opposition to appellants' application for a stay pending appeal, *Wallace* v. *Lee,* 387 U. S. 916 (1967).

[2] In July, 1963, the United States was added as a party plaintiff and as amicus curiae.

[3] Official resistance to that order was enjoined in *United States* v. *Rea,* 231 F. Supp. 772 (M. D. Ala. 1964).

In February, 1964, appellees filed a supplemental complaint, adding as defendants the Governor, the Executive Officer and Secretary of the Alabama State Board of Education (also known as, and herein referred to as, the State Superintendent of Education) and the other members of the State Board of Education. In this supplemental complaint appellees requested the district court (1) to enjoin these defendants from operating a dual school system based upon race throughout the State of Alabama; (2) to enter an order requiring state-wide desegregation of public schools in the State of Alabama; (3) to enjoin the use of state funds to perpetuate the dual school system and (4) to enjoin as unconstitutional the tuition grant law of 1957 (Code of Ala., Title 52 §§61(13)-61(21)). Thereupon the chief judge of the Court of Appeals for the Fifth Circuit, in response to the request of the district judge, constituted a three-judge court pursuant to 28 U. S. C. §§2281, 2284 (231 F. Supp. at 746). The three-judge court continued in effect, pending full hearing and determination, the temporary restraining order issued by the single district judge enjoining the state officials from their various forms of interference with the peaceful and orderly desegregation of the public schools.

After extensive trial and briefing, the court rendered its decision of July 13, 1964, 231 F. Supp. 743. The court found interference by the state officials with local school desegregation—and more. The court found that appellants possessed "general control and supervision over all the public schools in the State of Alabama" and that these powers were exercised to promote and maintain, rather

than to eliminate, segregation (231 F. Supp. at 756).[4] The court directed appellants to recognize that "in the exercise of their general control and supervision over all the public schools in the State of Alabama and particularly in the allocation and distribution of state funds for school operations, they have an affirmative duty to proceed with 'deliberate speed' in bringing about the elimination of racial discrimination in the public schools of this State" (231 F. Supp. at 756). Appellants were ordered "to formulate and place into effect plans designed to make the distribution of public funds to the various schools throughout the State of Alabama only to those schools and school systems that have proceeded with 'deliberate speed' in the desegregation of their schools and school systems as required by *Brown* v. *Board of Education*" (231 F. Supp. 756-57). But the court withheld state-wide desegregation, preferring to rely for a season upon the good faith of appellants (231 F. Supp. at 756):

> For the present time, this Court will proceed upon the assumption that the Governor, the State Superintendent of Education and the State Board of Education will comply in good faith with the injunction of this Court . . . and, through the exercise of considerable judicial restraint, no state-wide desegregation will be ordered at this time.

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[4] The Court found (231 F. Supp. at 750-51):

> The evidence in this case is clear that over the years the State Board of Education and the State Superintendent of Education have established and enforced rules and policies regarding the manner in which the city and county school systems exercise their responsibilities under state law. This control relates, among other things, to finances, accounting practices, textbooks, transportation, school construction, and even Bible reading.

Appellants were ordered to desist from interfering with local desegregation attempts "—either directly or indirectly —through the use of subtle coercion or outright interference" (231 F. Supp. at 756). Moreover, appellants were enjoined from (order of July 13, 1964, paragraph 6):

> Failing, in the exercise of its control and supervision over the public schools of the State, to use such control and supervision in such a manner as to promote and encourage the elimination of racial discrimination in the public schools, rather than to prevent and discourage the elimination of such discrimination.

The court also concluded that Alabama's tuition grant law was nothing more than a sham established for the purpose of financing with state funds a white school system in the State of Alabama and enjoined its continued operation (231 F. Supp. at 754).

On September 1, 1965, a new tuition grant statute was approved[5] which was challenged by a supplemental complaint filed by the United States.[6]

On September 2, 1966, Act No. 252, 1966 Special Session, was approved, which purported to nullify the school desegregation efforts by local public school officials pursuant to Title VI of the Civil Rights Act of 1964 and the regulations and guidelines promulgated thereunder by the United States Department of Health, Education and Welfare.[7]

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[5] Code of Ala. Tit. 52, §61(8).

[6] The supplemental complaint was filed in August, 1966 and alleged that the new tuition grant statute was for no purpose other than to perpetuate segregation in the public schools of Alabama.

[7] The Act provided, in relevant part: "Any agreement or assurance of compliance with the guidelines heretofore made or given

In September and November, 1966, appellees filed an additional supplemental complaint and a motion for further relief challenging Act No. 252 and "again asking for a state-wide desegregation order and an injunction against the use of state funds to support a dual school system" (267 F. Supp. at 461-62). Following extensive discovery, trial and briefing, the court rendered its decision on March 22, 1967, 267 F. Supp. 458.

The court's opinion confirmed its earlier findings that the appellants had enormous authority and power over the actual operation of the various local school systems throughout the state. "This conclusion was based on the actual assumption or usurpation of authority by these [appellants] over the local school boards, exemplified by their total control, when they chose to exert it, over the Macon County school system, and also by the general statutory power granted to these various officials to supervise and control the public schools in the State of Alabama" (267 F. Supp. at 462).

The court found from the actions of appellants since July 13, 1964 that its reliance upon the good faith of the appellants had been misplaced (267 F. Supp. at 465): "Not only have these [appellants], through their control and influence over the local school boards, flouted every effort to make the Fourteenth Amendment a meaningful reality to Negro school children in Alabama; they have apparently dedicated themselves and, certainly from the evidence in this case, have committed the powers and resources of their

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by a local, county or city board of education is null and void and shall have no binding effect." This Act was struck down in *NAACP* v. *Wallace*, 269 F. Supp. 346 (M. D. Ala. 1967).

offices to the continuation of a dual public school system such as that condemned by *Brown* v. *Board of Education*, 347 U. S. 483."

Therefore, the court concluded that an order granting state-wide desegregation should no longer be withheld (267 F. Supp. at 465):

> Based upon this fact and a continuation of such conduct on the part of these state officials as hereafter outlined, it is now evident that the reasons for this Court's reluctance to grant the relief to which these plaintiffs were clearly entitled over two years ago are no longer valid.

The court set forth in its opinion striking examples of appellants' actions constituting "dramatic interference with local efforts to desegregate public schools" (267 F. Supp. 462-470). But, the court concluded, "the most significant action by these [appellant] state officials, designed to maintain the dual public school system based upon race, is found in the day-to-day performance of their duties in the general supervision and operation of the system" (267 F. Supp. at 470). The court then summarized the appellants' "wide range of activities to maintain segregated public education throughout the State of Alabama" (267 F. Supp. 470-78). "These activities have been concerned with and have controlled virtually every aspect of public education in the state, including site selection, construction, consolidation, assignment of teachers, allocation of funds, transportation, vocational education and the assignment of students" (267 F. Supp. at 478).

Because it could "conceive of no other effective way to give the [appellees] the relief to which they are entitled

under the evidence in this case" (267 F. Supp. at 478), the court ordered a uniform state-wide plan for school desegregation.

The court also enjoined the 1965 version of the Alabama tuition grant statute,[8] finding that "[i]t is clear that the present tuition statute was born of the same effort to discriminate against Negroes, and was designed to fill the vacuum left by this Court's injunction against the 1957 tuition statute" (267 F. Supp. at 477).[9]

On May 22, 1967, this Court denied a stay of the district court's injunction, *Wallace* v. *Lee*, 387 U. S. 916.

ARGUMENT

The Court Below Was Clearly Correct in Ordering the Appellants to Implement the School Desegregation Decisions of This Court.

The court below correctly concluded that this Court's school desegregation decisions[10] would continue to have little

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[8] Code of Alabama, Title 52, §61(8) (Act No. 687, approved September 1, 1965).

[9] On August 31, 1967, appellant Wallace approved a new tuition grant statute to fill the vacuum left by the court's injunction in issue here (Act No. 266).

[10] See, e.g., *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Brown* v. *Board of Education*, 349 U. S. 294 (1955); *Cooper* v. *Aaron*, 358 U. S. 1 (1958); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E. D. La. 1961), aff'd, 368 U. S. 515 (1962); *Griffin* v. *County School Board of Prince Edward County*, 377 U. S. 218 (1964); *Bradley* v. *School Board of Richmond*, 382 U. S. 103 (1965). See also *Evans* v. *Ennis*, 281 F. 2d 385 (3rd Cir. 1960), cert. den. 364 U. S. 933 (1961).

meaning and effect in Alabama[11] unless appellants were ordered to apply the same ingenuity, effort and resources to eradicate the dual school system in Alabama that they had applied to create and maintain it. The court correctly appraised appellants' power over public education in Alabama and fashioned a remedy adequate to reverse the thrust of that power, requiring appellants to promote desegregation rather than fight a rearguard action against it.

A. *The Court Below Correctly Appraised Appellants' Power Over Public Education in Alabama and Correctly Found That That Power Had Been Exercised to Thwart Rather Than to Promote Desegregation.*

"To maintain the racial characteristics of the Alabama public school system, the [appellant] state officials have used their power in essentially two ways. First, they have used their authority as a threat and as a means of punishment to prevent local school officials from fulfilling their constitutional obligation to desegregate schools, and, second, they have performed their own functions in such a way as to maintain and preserve the racial characteristics of the system" (267 F. Supp. at 466).

The evidence as to appellants' interference with local desegregation attempts is overwhelming. The record is replete with outrageous examples of "dramatic interference with local efforts to desegregate public schools" (267 F. Supp. at 470); a few are detailed in the court's opinion, 267 F. Supp. 462-70. They reveal persistent pressure on

[11] The extent of school desegregation in Alabama has been pitifully small. In the Fall of 1966, 95% of the state's Negro pupils were attending *totally* segregated schools. *Report of the United States Commission on Civil Rights, Southern School Desegregation,* 1966-67, pp. 8-11.

local school officials to maintain segregation, including threats to cut off state funds (see, e.g., Plaintiff's Exhibit 11),[12] to use the state police power (see 267 F. Supp. at 469) and to expose local officials to public hostility (see Transcript, pp. 61-62) and demands that the local officials resist "illegal" desegregation, that is, desegregation beyond the *minimum* requirements of the federal courts (see 267 F. Supp. at 467-68; see also Government's Exhibits 6-11, 94; Transcript, p. 33). Local officials who avoided desegregation were rewarded with additional state funds (see 267 F. Supp. at 469-70; Government's Exhibits 95-97; Defendants' Exhibit 5).

But, the court found, "the most significant action by these [appellant] state officials, designed to maintain the dual public school system based upon race, is found in the day-to-day performance of their duties in the general supervision and operation of the system" (267 F. Supp. at 470). "These activities have been concerned with and have controlled virtually every aspect of public education in the state, including site selection, construction, consolidation [see 267 F. Supp. at 470-72], assignment of teachers [see 267 F. Supp. at 472-73], allocation of founds [see 267 F. Supp. at 469-70], transportation [see 267 F. Supp. at 473-74], vocational education [see 267 F. Supp. at 474-75], and the assignment of students" (267 F. Supp. at 478).

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[12] Subsequent to the court's decision, on September 1, 1967, appellant Wallace approved an Act (No. 285) requiring all students to designate the race of their teacher and providing for the cut-off of state funds to local school boards which did not require and enforce those designations. On application by appellees, the three-judge court below issued a temporary restraining order against the Act's enforcement on September 5, 1967.

B. *The Relief Fashioned by the Court Below Represents a Measured and Carefully Considered Judicial Response to Years of Foot-Dragging and Defiance by State Officials Responsible for School Desegregation in Alabama.*

The court below acted on the principle that the equitable remedy must be coextensive with the wrong suffered by appellees and members of their class. Having examined the wide range of appellants' activities, see Part A, *supra*, the court decided that "[t]he remedy to which these [appellees] are constitutionally entitled must be designed to reach the limits of the [appellants'] activities in these several areas and must be designed to require the [appellants] to do what they have been unwilling to do on their own—to discharge their constitutional obligation to disestablish in each of the local county and city school systems in Alabama that are not already operating under a United States court order, the dual public school system to the extent that it is based upon race or color" (267 F. Supp. at 478). The court's decree does just that (see 267 F. Supp. at 480-91).

Preliminarily, it should be noted that the decree is directed specifically and solely to the appellant state officials, and *not* to local school boards. All the decree requires is that the appellants use *their* undoubted power to implement a state-wide desegregation plan.[13]

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[13] Appellants see a due process violation in the fact that the local school boards were not made formal parties to the suit. This contention was effectively dealt with by the court below (267 F. Supp. at 479):

> The argument that this Court is proceeding without jurisdiction over indispensable parties to this litigation, to-wit, local school boards throughout the state, is not persuasive. We are dealing here with state officials, and all we require at

The decree requires the appellants to exercise their clearly established powers, which heretofore have been used to frustrate desegregation, to effectuate the disestablishment of the dual school system in Alabama by taking the following actions (267 F. Supp. at 480-91):

1. To require that all local school boards not under court desegregation order adopt uniform plans for desegregation that meet minimum constitutional standards;

2. To plan school construction and consolidation so as to promote desegregation;

3. To encourage and assist faculty desegregation;

4. To exercise their supervision over proposed school bus routes so as to eliminate race as a basis for assigning students to school buses and to eliminate overlapping and duplicative bus routes based upon race;

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this time is that those officials affirmatively exercise their control and authority to implement a plan on a state-wide basis designed to insure a reasonable attainment of equal educational opportunities for all children in the state regardless of their race. It may be that in some instances a particular school district will need to be brought directly into the litigation to insure that the defendant state officials have implemented this Court's decree and that the state is not supporting, financially or otherwise, a local system that is being operated on an unconstitutional basis. Hopefully, these instances will be the exception and not the rule. Clearly this possibility does not diminish the propriety of the state-wide relief to be ordered. Having already resolved this issue of state-wide relief against the defendants in the order made and entered in Lee, et al. (United States of America, Amicus Curiae) v. Macon County Board of Education, July 13, 1964, 231 F. Supp. 743, further discussion and analysis is not necessary.

5. To terminate all forms of segregation and discrimination in all educational institutions under the direct control of the State Board of Education, including trade schools, junior colleges and state colleges;

6. To formulate a detailed program for equalizing Negro schools with white schools;

7. To refrain from interfering with local officials in their attempt to eliminate the dual school system; and,

8. To submit periodic detailed reports of their progress to the court and to the parties.

Appellants urge the court to note probable jurisdiction to eliminate "the chaos now existing in the field of public education" (Jurisdictional Statement, p. 59). Any chaos which may exist in public education in Alabama is of the appellants' own making. It is they who have employed every resource at their command to circumvent, and sometimes defy, the school desegregation decisions of this Court. When the appellants abandon the segregation policies which they have imposed upon the State of Alabama, then local school officials will "be able to return to the teaching of students and dealing with the related educational problems rather than expending their time and energies trying to tread the difficult 'middle ground' between conflicting federal and state demands" (267 F. Supp. at 478-79). To hasten that day, the decision below should be affirmed.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

SEP 30 1967

JOHN F. DAVIS, CLERK

No. 671

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER SESSION, 1967.

THE BIBB COUNTY BOARD OF EDUCATION, ELLINGTON P. JONES, HENRY BOLDING, BRITT COX, C. E. HORNSBY, JR., and FRANCIS B. PRATT,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

JURISDICTIONAL STATEMENT

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1.

(a)

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE DECREES, ORDERS AND OPINIONS DELIVERED IN THE COURT BELOW.

Order dated May 18, 1967, signed by United States Circuit Judge Richard T. Rives, United States District Judge H. H. Grooms and United States District Judge Frank M. Johnson, Jr.

This is the order appealed from and made the subject of this particular appeal, a copy being appended hereto as Appendix 1. It is doubtful whether it was intended to be an opinion as such (it is certainly not a formal opinion), but since (h) of Rule 15 requires that the Court's findings and conclusions of law be appended, the portions of the findings and order of that date, applying to The Bibb County Board of Education and its members, are shown in Appendix 1.

This order and the appeal therefrom arise as an incident and sequel to the decree and judgment dated March 22, 1967, signed by the same three judges, and made the basis of the appeal in the case already docketed in this Court as No. 489, October Session, 1967, entitled as follows:

> Governor Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer of Alabama State Board of Education; James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrell, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Ward and Harold C. Martin, as members of Alabama State Board of Education, Appellants, v. United States of America, Appellee.

For convenience we characterize this as the main case, the opinion in which is reported in 267 F. Supp. 458 (M. D. Alabama 1967). Three prior opinions in the main case are:

Anthony T. Lee et al., and United States of America, Plaintiff and Amicus Curiae v. Macon County Board of Education (1963), 221 F. Supp. 297;
United States v. Wallace (1963), 222 F. Supp. 485;
United States v. Rea (1964), 231 F. Supp. 772;

Lee and the United States of America, Plaintiff and Amicus Curiae v. Macon County Board of Education (1964), 231 F. Supp. 743.

[These citations, we conceive, are required by 1 (h) of Rule 15.]

A copy of the judgment and decree of March 22, 1967, is appended as Appendix 1 to the Jurisdictional Statement of the appellants in the main case, Governor Lurleen Burns Wallace et al., Appellants v. United States of America, Appellee, already on file in this Court, and a copy of the opinion therein is shown as Appendix 2 thereof. To avoid duplication and for the sake of brevity, the appellants, The Bibb County Board of Education et al., ask leave to adopt by reference the contents of that Jurisdictional Statement, with appendices, insofar as the contents are relevant to the issues involved herein.

(b)

A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED:

(i) The nature of the proceeding and the statute pursuant to which it is brought.

The order of the Court below, appealed from, dated May 18, 1967, was by a three-judge court constituted pursuant to Sections 2281 and 2284, Title 28, United States Code, for the purpose of hearing this cause in United States District Court for the Middle District of Alabama, Eastern Division, composed of United States Circuit Judge Richard T. Rives and United States District Judges H. H. Grooms and Frank M. Johnson, Jr. This appeal is taken pursuant to 28 United States Code, Section 1253. Said

Court was constituted, in accordance with the provisions of the statutes of the United States, by order granted on the 6th day of February, 1964, a copy of which is attached as Appendix 21 (p. A256) to the Jurisdictional Statement in the main case.

Following the rendition of the final decree in the main case and the opinion of the three-judge court, filed March 22, 1967 (See Appendix I and Appendix II, Jurisdictional Statement, main case), which, among other things, directed the State Superintendent of Education to require ninety-nine school boards in Alabama (including the Bibb County Board) to file with the State Superintendent a uniform plan of desegregation prescribed in the decree of March 22, 1967, the Bibb County Board of Education, standing upon what it conceived to be its rights, failed to comply with the requirement, and hence on April 22, 1967, after the taking of the appeal in the main case (notice filed April 7, 1967—Appendix 4, main case, Jurisdictional Statement, p. A149), the United States, plaintiff-intervenor in the main case, filed a motion to add, ex parte, four school boards, including the Bibb County Board, as parties defendant, and also for an order requiring the Bibb County Board, among others, to show cause why an order should not be entered requiring said Board to adopt a desegregation plan meeting the standards embodied in the plan of the decree of March 22, 1967, main case (plan attached as Exhibit A to the decree). This motion is a part of the record, but is not attached as an appendix. The District Court made an order thereon, dated April 24, 1967 (Appendix X, Jurisdiction Statement, main case, p. A175) adding the Bibb County Board as a party, and ordering said Board, among others, to appear before the Court on the morning of May 13, 1967, "to show cause." • • • why said Board should not be ordered to adopt such desegregation plan. Prior to the entry of this order, the Bibb County Board of Education had not been a party

in any sense to the court proceedings. While the deposition of the Board's Superintendent, Mr. Pratt, had been taken, as shown by the record, this was taken in the main case long before the Board became a party and without any representation on the part of said Board in the taking of such deposition. The allowance of this deposition in evidence over the objection of the Board's attorney on May 13, 1967, at the hearing on the order to show cause, is assigned as error.

Thus, the only pleading filed against the Bibb County Board, the Government's motion on an order to show cause, utterly fails to allege any facts, or to make any charges against the Board, which would justify the order which was later rendered by the three-judge court, requiring the Bibb County Board mandatorily to adopt and file such plan of desegregation.

At the hearing on May 13, 1967, the Bibb County Board of Education and the individual appellants here (members of the Board and the Superintendent, all added as parties defendant along with the Bibb County Board) filed an objection to the motion of the United States (to show cause) containing ten separate grounds challenging the jurisdiction of the District Court to require the Board to submit a plan of desegregation, and also asserting improper venue. The concluding paragraph contains a prayer that the objection and each ground thereof be treated in the alternative as a motion to dismiss (the last ground of the objection is that the motion of the United States fails to state a claim against the said Board and the individual objectors upon which relief can be granted).

The objection is attached as Appendix 2 to this Jurisdictional Statement and appellants ask and pray that the separate and several grounds be treated as questions presented by this appeal under paragraph (c) (1) of Rule 15 of this Court.

This action leading up to the judgment of March 22, 1967, was initiated by supplemental complaints filed by the United States of America acting through the Attorney General as plaintiff-intervenor and amicus curiae in September and November, 1966, seeking (a) to have declared unconstitutional a tuition grant law passed by the legislature of the State of Alabama and approved by the governor on September 1, 1965, which appears as Title 52, No. 61 (8) of the Code of Alabama and (b) as described by the three-judge court (p. A31) "asking for a state-wide desegregation order and an injunction against the use of state funds to support a dual school system."

The proceeding (motion) by which the Bibb County Board and its individual members and officer were first brought into the case, culminating in the mandatory order of May 18, 1967, was not based specifically upon any statute, and the only statute or statutes that can be involved are those conferring jurisdiction upon the three-judge court, already mentioned.

(ii) **The date of the Judgment or Decree sought to be reviewed and the time of its entry, the date of any Order respecting a rehearing, the date the Notice of Appeal was filed, and the Court in which it was filed.**

The date of the judgment or decree sought to be reviewed is May 18, 1967, also the time of its entry. There is no order on rehearing, none having been requested. The notice of appeal was filed on June 17, 1967, in the United States District Court for the Middle District of Alabama, Eastern Division. This order has already been attached as Appendix 1 to this Jurisdictional Statement.

(iii) **The Statutory Provision believed to confer on this Court jurisdiction of the appeal.**

Section 1253, Title 28 of the United States Code, which authorizes appeals directed to this Court from injunctive

orders of a three-judge court is conceived to be the statute involved. Sections 2281 and 2284, Title 28, United States Code, prescribe the jurisdiction of three-judge courts.

(iv) **Cases believed to sustain the jurisdiction.**

The three-judge court was constituted as shown in **Lee, et al., v. Macon County Board of Education,** M. D. Alabama, 231 F. Supp. 743, July 13, 1964, and in the subsequent case of the same name, reported in 267 F. Supp. 458 (the report of the main case). The court was constituted in the first instance primarily because of the attack upon the constitutionality of the first tuition grant law of the State of Alabama, (Chapter 4B [§§ 61(13) through 61(21)] Title 52, Code of Alabama), and subsequently, upon supplemental complaint, the court was called upon to pass upon the Alabama 1965-1966 tuition grant law, § 61(8), Title 52, Code of Alabama. Evidently considering that the question whether the defendants in the main case, the governor, the Alabama State Board of Education, the members of said Board, and the State Superintendent of Education, all state officials, had exercised such authority over the actual operation of the various school systems throughout the state so as to maintain a segregated or dual system of schools (pp. A31, A62, A63, A64, et seq., the opinion in the main case as shown in the appendix to the Jurisdictional Statement [Case No. 489]), bore a close relationship to the question of the constitutionality vel non of the tuition grant laws, the three-judge court enjoined the defendants in the main case from "discriminating on the basis of race in the operation or the conduct of the public schools of Alabama or in any manner pertaining to the public schools of Alabama" (Decree, March 22, 1967, Appendix, p. A2, Jurisdictional Statement, main case), and ordered the State Superintendent of Education to notify ninety-nine school systems,

including the Bibb County Board of Education (each being under the supervision and management of city and county boards of education, each an independent corporate agency of the state—Title 52, Chs. 5 and 8, Alabama Code), that each was required to adopt a desegregation plan for all grades commencing with the 1967-68 school year meeting the standards embodied in the plan attached to the decree as Exhibit A. None of these boards had been subjected to any previous court order, and none had been made a party to the litigation. In regard to the contention made on the hearing in the main case by the defendants therein in effect that the court should not enter a decree directed against the local boards without at least making them a party to the litigation (the argument being that they were indispensable parties if they were to be subjected to the mandates of the decree), the court said (Appendix, A65, to the Jurisdictional Statement in Case No. 489, also reported in 267 F. Supp. 458, 482):

> "The argument that this Court is proceeding without jurisdiction over indispensable parties to this litigation, to-wit, local school boards throughout the state, is not persuasive. We are dealing here with state officials, and all we require at this time is that those officials affirmatively exercise their control and authority to implement a plan on a state-wide basis designed to insure a reasonable attainment of equal educational opportunities for all children in the state regardless of their race. It may be that in some instances a particular school district will need to be brought directly into the litigation to insure that the defendant state officials have implemented this Court's decree and that the state is not supporting, financially or otherwise, a local system that is being operated on an unconstitutional basis. Hopefully, these instances will be the exception and not the rule. Clearly this possibility does not diminish the propriety of

> the state-wide relief to be ordered. Having already resolved this issue of state-wide relief against the defendants in the order made and entered in **Lee, et al., United States of America, Amicus Curiae v. Macon County Board of Education**, July 13, 1964, 231 F. Supp. 743, further discussion and analysis is not necessary."

The Bibb County Board was later brought into the case, after final decree, as suggested in the above quoted excerpt from the opinion, and asserted and now asserts that the Court below committed error in that regard and in the decree that was later entered against the board, as below outlined, but cites and quotes all of the above as supporting the general jurisdiction of the court to act (although the court committed error in so acting, the appellants contend).

(v) The validity of a statute is not directly involved on this particular appeal.

(c)

THE QUESTIONS PRESENTED BY THIS APPEAL.

The grounds of the objection of the Bibb County Board to the motion of the United States to show cause, appended as Appendix 2 to this Jurisdictional Statement (also including a motion to dismiss) presents substantial questions involved on this appeal. That portion of the appellants' notice of appeal from the order of May 18, 1967, outlined in the questions presented on appeal, is appended hereto as Appendix 3. Appellants ask that these be treated as statement of questions presented on appeal as if incorporated in this section of the Jurisdictional Statement, as well as the grounds stated in the "objection", Appendix 2 (we eliminate the ground or

grounds of objection whereby it was contended in the District Court that the subject matter of the hearing below was not a proper matter for the jurisdiction of a three-judge court).

More succinctly stated, three of the principal questions presented may be stated as follows:

(1) Did the District Court for the Middle District have proper venue over the Bibb County Board, its members and superintendent, all of whom were residents of Bibb County within the area of the Northern District of Alabama as shown by the record within the meaning of Section 1391, Title 28, United States Code Annotated, the Bibb County Board and the individual appellants being not made parties prior to the final decree of March 22, 1967, and the proceeding against the Board and the individuals following that decree being necessarily an original and independent proceeding against these appellants?

(2) Were the Bibb County Board and the other appellants properly joined with the defendants in the main case as parties defendant, within the meaning of Rule 20 of the Federal Rules of Civil Procedure in view of the fact that (we assert) by the very nature of this supplementary proceeding the right to relief asserted against the Board and individual defendants was not in respect of or arising out of the same transaction or occurrence or series of transactions or occurrences, as the right asserted in the main case?

(3) Did the court err in ordering the Bibb County Board of Education, its members and superintendent, to adopt and file the uniform plan of desegregation, the plan submitted to be adopted by the other ninety-eight boards (the equivalent of a permanent mandatory injunction), merely on a motion following the decree in the main case (to which the Bibb County Board was not a party), on a mo-

tion which alleged nothing against the Board (and there was no other pleading which made a charge against the Board), by way of discrimination or otherwise, and which placed the burden upon the Board to acquit itself of that with which it had not been charged?

(4) Did the court err in rendering its decree against the Bibb County Board, and the other appellants, ordering the adoption and filing for the plan of desegregation merely upon the basis of the introduction by the United States of the deposition of the Superintendent of Schools of Bibb County over the objection of said appellants, such deposition having been taken prior to the time when said appellants became parties to any proceeding?

(5) Did the court err in holding that the motion of the United States, the only pleading directed against these apellants, stated a claim upon which relief could be granted against these appellants?

(d)

A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

These have for the most part been stated as shown by the transcript of the proceedings. When the case was called for hearing, the Board and the individual defendants filed the objection to the granting of the motion, already noted and appended. All grounds of objection were overruled by the court, and the decree of mandatory injunction rendered on May 18, 1967, was based in essence upon the ground that the new defendants had not shown sufficient cause, and that the deposition of the superintendent (while admittedly taken and filed prior to the addition of the Board and the others as parties) was

sufficient as an "affidavit" in support of the motion for an order to show cause. The judgment of May 18, 1967, was actually a final judgment and it is inconceivable that the "affidavit" could have been treated as sufficient evidence against the Board (over the Board's objection) to justify the rendition of a mandatory injunction order. No facts were alleged in the only pleading involving the Board except only that the Board had failed to file the uniform plan. This constituted a denial of due process, an unwarranted procedure depriving the Board of its rights (and the individual defendants). The only proceeding against the Board was a motion and order to "show cause", a procedure unheard of in the annals of jurisprudence as such. There was no contempt citation (and if there had been, there was no proof), and no charge that the Board had acted in concert with any of the original defendants. The Board was an independent agency having full authority over the assignment of pupils and teachers within the system under its jurisdiction (See opinion of the justices [Sup. Ct. of Ala., 160 So. 2d 648]). Any evidence that the Board may have acted jointly with the defendants in the main case, or committed any act in respect of or arising out of the same transaction or occurrence as the act or acts of any of the state officials who were defendants in the main case, was necessarily adduced prior to the Board's having been made a party, and we do not believe that in any event there was any evidence of such in the record whatsoever.

Thus, the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution. We assert: The venue was wrong, the Board and the individual new defendants were improperly joined, the only pleading filed against the Board (and the other appellants) failed to state a claim upon which relief could be granted, and the

Board and appellants were called upon, without any sufficient evidence, to acquit themselves of some charge which had not even been made.

Respectfully submitted,

.....

REID B. BARNES,
Exchange Security Bank Building,
317 North 20th Street,
Birmingham, Alabama 35203,

.....

GEORGE P. WHITE,
Centreville, Alabama,
Attorneys for Named Appellants.

APPENDIX 1.

In the United States District Court for the
Middle District of Alabama,
Eastern Division.

Anthony T. Lee et al., Plaintiffs,
United States of America,
Plaintiff-Intervenor and
Amicus Curiae,
vs.
Macon County Board of Education
et al., Defendants.

Civil Action.
No. 604-E.

Writ of Injunction.

To: The Bibb County Board of Education; S. E. Belcher, Jr., President of the Bibb County Board of Education; Ellington P. Jones, Henry Bolding, Britt Cox, and C. E. Hornsby, Jr., Members of the Bibb County Board of Education; and Francis B. Pratt, Superintendent of Schools of Bibb County:

Take Notice that you and each of you, together with your officers, agents, employees, successors and all persons in active concert or participation with you who shall receive notice of this order, be and you are hereby Enjoined as more particularly set out in the Order made and entered by this Court in this cause on this date, a copy of which is hereby served upon you.

Witness my hand and the seal of this Court on this the 18th day of May, 1967.

R. C. Dobson,
Clerk of the United States District
Court for the Middle District of
Alabama,

By: Jane P. Gordon,
Deputy Clerk.

In the United States District Court
For the Middle District of Alabama,
Eastern Division.

Anthony T. Lee et al., Plaintiffs,

United States of America,
Plaintiff-Intervenor and
Amicus Curiae,

vs.

Macon County Board of Education
et al., Defendants.

Civil Action.
No. 604-E.

Order.

(Filed May 18, 1967, R. C. Dobson, Clerk.)

This cause having regularly come on for hearing on the Order of this Court of April 24, 1967, requiring the defendant school officials of Autauga County, Bibb County, Cullman County and Pickens County to show cause why they should not be ordered to adopt desegregation plans meeting the standards embodied in this Court's Order of March 22, 1967, upon the motion of the defendant state officials to drop said local school officials as party defendants, and upon the objections of the Bibb County Board of Education and its members to the motion of the United States for the said Order to Show Cause, and the parties having appeared by counsel, and the Court having received evidence and having heard argument of counsel, and

It appearing to the Court that:

1. The Autauga County Board of Education has adopted a plan of desegregation conforming in all regards to the model desegregation plan attached as Exhibit "A" to the Order of this Court of March 22, 1967 and has transmitted such plan by letter of April 27, 1967 from its counsel to

State Superintendent Ernest Stone who in turn has submitted the plan to this Court.

2. By letter of May 1, 1967, the Superintendent of Schools of Cullman County transmitted to this Court a supplement to its desegregation plan, previously adopted, stating that, commencing with the 1967-68 school year, the Cullman County Board of Education would close the only traditionally Negro school maintained by the Board in the County and would transfer all of the Negro teachers presently assigned to that school to schools heretofore maintained for white students. By further letter of May 8, 1967, from the Superintendent of Schools of Cullman County to this Court and by statements made by their counsel in open Court open the hearing of these motions, the Board of Education of Cullman County has assured that all Negro students residing within the territorial limits of the Cullman County School System will be educated in the schools of Cullman County.

3. The Pickens County Board of Education on May 12, 1967, filed with this Court an answer to the Show Cause Order attaching a desegregation plan which was adopted by the Pickens County Board of Education on May 9, 1967, and which conforms in all respects with the model plan attached as Exhibit "A" to the Order of this Court of March 22, 1967.

4. The Bibb County Board of Education, its members, and the Superintendent of Schools of Bibb County have filed no response to the Order to Show Cause other than the "Objections" heretofore referred to and have offered no evidence to show cause why the Bibb County Board of Education should not be ordered to adopt and implement a plan of desegregation, other than the statement by their counsel that the Board has since March 22, 1967, directed certain questionnaires to the students and teachers in the Bibb County School System. The deposition of the Super-

intendent of Schools of Bibb County, which was offered into evidence by the United States upon the hearing and has been received by the Court, establishes that the Board of Education of Bibb County is operating a dual school system based on race, under which it maintains separate schools for Negro students, staffed solely by Negro personnel and attended solely by Negro students, and maintains separate schools for white children, staffed solely by white personnel and attended solely by white students. The Board maintains separate bus transportation systems for Negro and white students. The Board has failed to adopt any plan for the assignment of students on a nonracial basis meeting the requirements of this Court's Order of March 22, 1967, nor has it adopted any plan or taken any effective steps for the desegregation of the faculty or staff of the schools nor for the desegregation of the transportation systems. Counsel for the Board does not dispute these facts.

And the Court being of the view that:

1. This Court has jurisdiction of the subject matter raised by the Order to Show Cause, whether viewed as a proceeding ancillary to the main proceeding in this cause, or as a separate claim properly joinable with such main proceeding.

2. This Court has jurisdiction of the parties named in the Show Cause Order, and venue of the matters raised by that Order is properly in this Court.

3. The issues raised by the Show Cause Order with respect to the defendant boards and officials of Autauga County, Cullman County and Pickens County have become moot by their actions above described.

4. The failure of the defendant board and officials of Bibb County to adopt a plan of desegregation or otherwise take effective action to disestablish the dual system in

Bibb County based on race and color violates the duty of said Board and officials under the 14th Amendment to the Constitution and prevents the full effectuation of this Court's Order of March 22, 1967.

Now Therefore It Is Ordered:

1. The Motion of Lurleen B. Wallace, the Alabama State Board of Education, its members, and Ernest Stone to drop parties defendant is Denied.

2. The Objection of the Bibb County Board of Education, its members and Francis B. Pratt to the motion of the United States is Overruled.

3. The defendant boards of education and officials of Autauga County, Cullman County, and Pickens County are discharged as parties defendant upon the ground that the issues raised by the Order to Show Cause are now moot as to them.

4. The Bibb County Board of Education, S. E. Belcher, Jr., President, and Ellington P. Jones, Henry Bolding, Britt Cox and C. E. Hornsby, Jr., members of the Bibb County Board of Education and Francis B. Pratt, Superintendent of Schools of Bibb County, together with their officers, agents, employees, successors and all persons in active concert or participation with them are enjoined to adopt a desegregation plan for the Bibb County School System in the form attached to this Order and to fully carry out such plan.

Done this 18th day of May, 1967.

/s/ Richard T. Rives,
United States Circuit Judge,

/s/ H. H. Grooms,
United States District Judge,

/s/ Frank M. Johnson, Jr.,
United States District Judge.

DESEGREGATION PLAN.

The Bibb County Board of Education will take the following affirmative action to disestablish all state enforced or encouraged public school segregation and to eliminate the effects of past state enforced or encouraged racial discrimination in the operation of the school system:

I

Exercise of Choice.

The following provisions will apply to all grades commencing with the 1967-68 school year:

A. **Who May Exercise Choice.** A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this plan to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

B. **Annual Exercise of Choice.** All students, both white and Negro, will be required to exercise a free choice of schools annually.

C. **Choice Period.** The period for exercising choice will commence May 22, 1967 and end June 9, 1967, and in subsequent years will commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exer-

cises his choice within the choice period will be given any preference because of the time within the period when such choice was exercised.

D. **Mandatory Exercise of Choice.** A failure to exercise a choice within the choice period will not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who exercised choice before the expiration of the choice period. Any student who has not exercised his choice of school within a week after school opens will be assigned to the school nearest his home where space is available under standards for determining available space which will be applied uniformly throughout the system.

E. **Public Notice.** On or within a week before the date the choice period opens, the school board will arrange for the conspicuous publication of a notice describing the provisions of this plan in the newspaper most generally circulated in the community. The text of the notice will be substantially similar to the text of the explanatory letter sent home to parents. Publication as a legal notice will not be sufficient. Copies of this notice will also be given at that time to all radio and television stations serving the community. Copies of this plan will be posted in each school in the school system and at the office of the Superintendent of Education.

F. **Mailing of Explanatory Letters and Choice Forms.** On the first day of the choice period there will be distributed an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the school board) of each student, together with a return envelope addressed to the Superintendent. The text for the explanatory letter and choice form will essentially conform to the sample letter and choice form appended to this plan.

G. **Extra Copies of the Explanatory Letter and Choice Form.** Extra copies of the explanatory letter and choice form will be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

H. **Content of Choice Form.** Each choice form will set forth the name and location of and grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of one parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, will be required or requested.

I. **Return of Choice Form.** At the option of the person completing the choice form, the choice may be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

J. **Choices Not on Official Form.** The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

K. **Choice Forms Binding.** When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices for their children under the conditions set forth in paragraph I-A of this plan and in exceptional cases where, absent the consideration of race, a change is edu-

cationally called for or where compelling hardship is shown by the student.

L. **Preference in Assignment.** In assigning students to schools, no preference will be given to any student for prior attendance at a school and except with the approval of the State Superintendent of Education in extraordinary circumstances, no choice will be denied for any reason other than overcrowding. In case of overcrowding at any school, preference will be given on the basis of proximity of the school to the home of the students choosing it, without regard to race or color. Standards for determining overcrowding will be applied uniformly throughout the system.

M. **Second Choice Where First Choice Is Denied.** Any student whose choice is denied will be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student will have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

N. **Transportation.** Where transportation is generally provided, buses will be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing the school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is at least two miles from his residence. The school system will adopt non-discriminatory bus routes and criteria governing the availability of bus transportation to students, so that race will not be a basis for assigning students to school buses and overlapping and duplicative bus routes based on race will be eliminated. Prior to the choice period, parents and children will be advised that such routes and criteria will be

adopted, and substantially prior to the opening of the 1967-68 school year the parents and children will be notified of the routes and criteria, in a readily understandable manner.

O. **Officials Not to Influence Choice.** At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any persons because of a choice made. If the school board employs professional guidance counselors, such persons will base their guidance and counseling on the individual student's particular personal, academic, and vocational needs. Such guidance and counseling by teachers as well as professional guidance counselors will be available to all students without regard to race or color.

P. **Protection of Persons Exercising Choice.** Within their authority, school officials are responsible for the protection of persons exercising rights under or otherwise affected by this plan. They will, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference will include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board will not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this plan. If officials of the school system are not able to provide sufficient protection, they will seek whatever assistance is necessary from other appropriate officials.

II.

Prospective Students.

Each prospective new student will be required to exercise a choice of schools before or at the time of enroll-

ment. Each such student known to the school system will be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Where there is no preregistration procedure for newly entering students, copies of the choice forms will be available at the office of the Superintendent and at each school during the time the school is usually open.

III.

Services, Facilities, Activities and Programs.

No student will be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extra-curricular activity) that may be conducted or sponsored by or affiiliated with the school in which he is enrolled. A student attending school for the first time on a desegregated basis will not be subect to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, nonracially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, will be open to all persons without regard to race or color. All special educational programs conducted by the school system will be conducted without regard to race or color.

IV.

School Equalization.

A. **Inferior Schools.** In schools heretofore maintained for Negro students, the school system will take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white persons. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios will, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this subparagraph, such school will be closed as soon as possible, and the students enrolled in the school will be reassigned on the basis of freedom of choice. By October of each year, the school board will report to the State Superintendent of Education pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and will outline the steps to be taken and the time within which they will accomplish the equalization of such schools.

B. **Remedial Programs.** The school system will provide remedial education programs which permit students attending or who have previously attended all-Negro schools to overcome past inadequacies in their education.

V.

School Construction and Consolidation.

To the extent consistent with the proper operation of the school system as a whole, the school board will, in

locating and designing new schools, in expanding existing facilities, and in consolidating schools, do so with the object of eradicating past discrimination and of effecting desegregation. The school board will not build, consolidate or expand schools based on recommendations of any state survey conducted prior to March 1967 unless the state reapproves such building, consolidation or expansion. The school board will not fail to consolidate schools because desegregation would result.

VI.

Faculty and Staff.

A. **Faculty Employment and Assignment.** Race or color will not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race will be taken into account for the purpose of correcting the effect of the past segregated assignment of teachers in the dual system. Teachers, principals, and staff members will be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers will be assigned so that more than one teacher of the minority race (white or Negro) will be on a desegregated faculty. The school board will take affirmative steps to accomplish the desegregation of its school faculties, including substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year. The objective of the school system is that the pattern of teacher assignment to any particular school shall not be indentifiable as tailored for a heavy concentration of either Negro or white pupils in the school. The school system will accomplish faculty desegregation in a manner whereby the abilities, experience, specialties, and other qualifications of both white and Negro teachers in the system

will be, insofar as administratively feasible, distributed evenly among the various schools of the system.

B. **Dismissals.** Teachers and other professional staff members will not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system will be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system will be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the State Superintendent of Education.

VII.

Reports.

A. **Report on Choice Period.** The school system will file with the State Superintendent of Education on or before June 10 of each year a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report will also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

B. **Report After School Opening.** The system will file with the State Superintendent of Education within 15

days after the opening of schools for the fall semester of each year a report setting forth the following information:

(1) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken on his request and the reasons therefor.

(2) The number of faculty vacancies, by school, that have occurred or been filled since the adoption of this plan or the latest report submitted pursuant to this subparagraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(3) The number of students by race, in each grade of each school.

EXPLANATORY LETTER.

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next school year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all white or all Negro. It does not matter which

school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 9, 1967.* You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or to the office of the Superintendent at any time between May 22 and June 9. No one may require you to return your choice form before June 9, and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. The school board is rerouting buses and writing new rules for assigning stu-

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* In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

dents to buses, so that there will be no more overlapping bus routes and students will be assigned to buses without regard to race. (Delete if the school system does not provide transportation.)

Your school board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out successfully.

Sincerely,

Superintendent.

CHOICE FORM.

This form is provided for you to choose a school for your child to attend next school year. You have 18 days to make your choice. It does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or a Negro school. This form must be mailed or brought to the principal of any school in the system or to the office of the Superintendent (address), by June 9, 1967. A choice is required for each child.

Name of child .....
(Last (First) (Middle)

Address .....

Name of parent or other
adult serving as parent .....

If child is entering first grade, date of birth:

.....
(Month (Day) (Year)

Grade child is entering .....

School attended last year .....

Choose one of the following schools by marking an X beside the name.

	Name of school	Grades Offered	Location
( )	.....	.....	.....
( )	.....	.....	.....

(All schools in the district, the grades offered by each, and the location of each will be listed on the form prior to its distribution to parents and students.)

Signature .....

Date .....

.....

.....

To be filled in by Superintendent:

School assigned .....

APPENDIX 2.

In the United States District Court for the Middle District of Alabama.

Anthony T. Lee et al., Plaintiffs,

United States of America, Plaintiff-Intervenor and Amicus Curiae,

vs.

Macon County Board of Education et al., Defendants.

Civil Action. No. 604-E.

Objection of the Bibb County Board of Education, Ellington P. Jones, Henry Boulding, Britt Cox, C. E. Hornsby, Jr., and Francis B. Pratt, to the Motion of the United States.

The Bibb County Board of Education and the individuals above named hereby object to the motion of the United States and say that the motion should be dismissed or overruled and as grounds hereof assign the following, separately and severally:

1. This Court has no jurisdiction on the motion of the United States in this proceeding, to require the said Board or the individuals to submit a plan of desegregation as called for in said motion.

2. Said Bibb County Board and each of the said individuals are residents only of Bibb County, Alabama, in the Northern District of Alabama, and there is improper venue as to each of them, in this proceeding, within the meaning of Section 1391, Title 28, United States Code Annotated.

3. The said motion is merely a supplementary, and not an original, proceeding and there is no sufficient showing

that this Court has jurisdiction to require the said Board and individuals to show cause why the said plan of desegregation should not be put into effect.

4. This Court was without jurisdiction to enter an order directing the State Superintendent of Education to direct the said Board to file said plan of desegregation, in its decree heretofore rendered (said Board having not been made a party to the said cause at the time), and this Court has now no jurisdiction to require this Board to submit such plan, or to show cause why it should not submit such a plan.

5. Requiring this Board in this procedure to submit such plan of desegregation, or to show cause why it should not do so, is not within the purview of the legal authority for appointing a three-judge court to pass upon the constitutionality of a state act (or the provision providing for granting tuition by the local boards to pupils to attend private schools), or of the purpose for designating such Court or for which such Court could have been designated.

6. This Board is an independent agency of the State of Alabama, vested by its laws with the sole power to assign or hire teachers, or to assign students, under the supervision of said Board, and this Board is not properly joined in this action, for reasons of improper venue and for other legal reasons.

7. The said motion, and the summons and order of the Court pursuant thereto, do not sufficiently inform the said Board and the said individuals as to the manner and extent in which or to which it is required to answer at this time.

8. This Board, and said individuals, cannot be legally required, and should not be required, to submit a plan of desegregation or to show cause why it should not submit one, without an original suit and hearing thereon.

9. The said Board and said individuals are not properly joined as defendants or respondents in this action under Rule 20, Federal Rules of Civil Procedure, or otherwise.

10. The said motion of the United States fails to state a claim against the said Board and the said individual objectors above named, upon which relief can be granted.

Since Rule 12 (b) of the Rules of Civil Procedure allow the filing by a defendant or defendants of a motion raising the defenses set forth in said Rule, as a preliminary responsive pleading, this said Board and the said individuals pray that the above objection, and each ground thereof, separately and severally, be treated in the alternative and separately as such a motion.

George P. White,
Centreville, Alabama,

Reid B. Barnes,
Exchange Security Bank Building,
Birmingham, Alabama 35203,

Attorneys for the Bibb County Board of Education, and the individual objectors above named.

APPENDIX 3.

The following questions are presented by this appeal: Did the Court err by taking the actions listed below?

1. Granting a permanent mandatory judgment in the Order of March 22, 1967; compelling the original defendants to act so as to materially and adversely affect the rights of the appellant, The Bibb County Board of Education, although said appellant had not been served with process and was not actually or constructively before the Court—all in violation of the Constitution of the United States and particularly the due process clause of the Fifth Amendment.

2. Granting a mandatory injunction requiring the appellant, The Bibb County Board of Education, to adopt the specific plan of desegregation attached to the said Order and Judgment of the District Court from which this appeal is taken, filed May 18, 1967, contrary to the Constitution of the United States and particularly the Tenth and Eleventh Amendments thereof, and in violation of the Constitutional separation of governmental powers between the United States of America and the States, and also such separation of powers between the judicial, executive and legislative branches of the States and the United States.

3. Entering the Order filed April 24, 1967, adding the appellant, The Bibb County Board of Education, and the individual appellants named in this Notice of Appeal, to show cause why said Board of Education and its members should not be required to adopt the plan of desegregation above described, and thereby improperly joining said The Bibb County Board of Education as a party defendant after the final judgment of March 22, 1967, had been entered, such joinder not being in proper imple-

mentation or enforcement of the said Judgment of March 22, 1967.

4. Entering the Order filed April 24, 1967, adding the appellant, The Bibb County Board of Education, and the individual appellants named in this Notice of Appeal, to show cause why said Board of Education and its members should not be required to adopt the plan of desegregation above described, and thereby improperly joining said The Bibb County Board of Education as a party defendant after the final judgment of March 22, 1967, had been entered, such joinder not being authorized either under § 1391, Title 28, United States Code, or any other venue statute, and not being proper under Rule 20 of the Federal Rules of Civil Procedure, or any other statute of rule.

5. In overruling by the said Order and Judgment of May 18, 1967, above described, the Objection of the said defendant, The Bibb County Board of Education, and the other individual appellants named herein, to the Motion of the United States (characterized as an "Objection"), and in the alternative the Motion under Rule 12 (b), Rules of Civil Procedure.

6. Holding by the Order and Judgment filed May 18, 1967, that the Court had jurisdiction of the cause presented by the Motion of the United States filed April 22, 1967.

7. Holding by the Order and Judgment filed May 18, 1967, that the Court had venue of the cause presented by the Motion of the United States filed April 22, 1967.

8. Holding by said Decree that the Court had jurisdiction of the defendant, The Bibb County Board of Education, and the individuals named herein as appellants.

9. Holding by said Decree that the Court had venue of the defendant, The Bibb County Board of Education, and the individual appellants named in this notice, all

of whom were shown without dispute to be residents of the Northern District of Alabama.

10. Holding by said Decree that the defendant, The Bibb County Board of Education, and the individual appellants named in this Notice, were properly joined as parties defendant.

11. In overruling in the hearing on May 13, 1967, before this Court the objection of the defendant, The Bibb County Board of Education, and the other individual defendants, to the introduction of the deposition of the Superintendent of Schools of Bibb County, and in receiving said deposition in evidence over said objection, such deposition having been taken prior to any addition of said The Bibb County Board of Education and the other appellants named in this notice, were added or made parties defendant, and their being no representation of these appellants or presence of them or their representatives at the taking of said deposition.

12. Holding by said Order and Judgment, filed May 18, 1967, that the Motion of the United States seeking to require said The Bibb County Board of Education to show cause why the said plan of desegregation should not be filed, stated a claim upon which relief could be granted.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 671

BIBB COUNTY BOARD OF EDUCATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court entered on May 18, 1967, be affirmed.

OPINIONS BELOW

The opinion of the three-judge district court is incorporated in the decree from which this appeal is taken (J.S. A15–32) and is not reported. The present decree was entered on further proceedings in the case of *Lee, et al.* v. *Macon County Board of Education, et al.*, reported at 267 F. Supp. 458, from which an appeal has been docketed in this Court as No. 489 *sub nom. Wallace et al.* v. *Lee, et al., and United*

280-163—67——1

States of America. Prior opinions in No. 489 are reported at 231 F. Supp. 743 and at 221 F. Supp. 297.

JURISDICTION

The judgment of the three-judge district court (J.S. A15–32) was entered May 18, 1967. A notice of appeal was filed on June 17, 1967. The time for filing the Jurisdictional Statement was extended by the district court to September 30, 1967, and it was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.[1]

QUESTION PRESENTED

Whether the district court properly joined the appellants as parties defendant and required them to adopt for the Bibb County School System the desegregation plan attached to the district court order of May 18, 1967.

STATEMENT

The Procedural History. On March 22, 1967, the court below rendered its decision in *Lee, et al.* v. *Macon County Board of Education, et al.* (referred

[1] An action seeking the desegregation of a single school district is not of such a nature as to require the convening of a three-judge court. See *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 336 (E.D. La.), leave to file petition for mandamus denied, 351 U.S. 948. The decree from which this appeal was taken was not, however, the result of such an action. This is, rather, a further proceeding in the main case (No. 489), seeking to enforce the three-judge court's original order in that case. We therefore believe that this appeal properly falls within this Court's jurisdiction as conferred by 28 U.S.C. § 1253. Cf. *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861, 191 F. Supp. 871, 194 F. Supp. 182 (E.D. La.), affirmed, 366 U.S. 212, 367 U.S. 908, 368 U.S. 339.

to hereinafter as the "main case"), which is presently on appeal in this Court in No. 489, *sub nom. Wallace, et al. v. Lee, et al. and United States of America*, stay denied, 387 U.S. 916. After the entry of this decree, the State Superintendent of Education notified each of the 99 Alabama school systems named in that decree, including the appellants herein, that they were required to adopt a desegregation plan meeting the standards set forth in a model plan attached to the court's decree (J.S. in No. 489, A2–A10). By report dated April 17, 1967 (see J.S. in No. 489, A172–A174), the State Superintendent submitted to the district court desegregation plans for each of the 99 systems with the exception of Bibb County.

On April 24, 1967, on the motion of the United States, the district court entered an order adding several parties, including the appellants herein, as defendants in the main case and directing the added defendants to show cause why they should not be required to adopt a desegregation plan conforming to the court's model plan (J.S. in No. 489, A175–A179). At the hearing on May 13, 1967, the Bibb County Board of Education filed objections (J.S. A33–35), which were overruled. The court received evidence, heard argument of counsel and subsequently entered the order of May 18, 1967, from which this appeal was taken.

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[2] The procedural history of the litigation in the main case is set forth in the United States' Motion to Affirm in No. 489 at pp. 2–8 and is not repeated here. We are serving upon the appellants our Motion to Affirm in No. 489.

The District Court's Decision. The district court found that Bibb County had failed to respond affirmatively to the order to show cause other than by filing the objections to the court's jurisdiction. Certain questionnaires directed to the students and teachers in Bibb County constituted the only implementation of a plan of desegregation (R. 1464). The court found that the deposition of the superintendent of schools of Bibb County[1] established that the county operated a dual school system based on race, with racially segregated schools, student bodies and faculties, and separate bus transportation systems for Negro and white students. The court observed: "The Board has failed to adopt any plan for the assignment of students on a non-racial basis meeting the requirements of this Court's order of March 22, 1967, nor has it adopted any plan or taken any effective steps for the desegregation of the faculty or staff of the schools nor for the desegregation of the transportation systems. Counsel for the Board does not dispute these facts" (J.S. A18). Upon these findings, the district court ordered the appellants to adopt the desegregation plan attached to the court's order and fully to carry out the plan (J.S. A19).

[1] Since the superintendent was not available due to sickness, the court properly received his deposition in evidence. Rule 25(d)(3), F.R. Civ. P. The deposition had already been introduced in evidence in the main cause and was reoffered as competent evidence in this proceeding. Upon inquiry of the court, the appellants' counsel declined to offer any evidence in response to the show cause order (R. 1454–1455) and declined to answer the court's question whether there was any dispute that Bibb County operated a dual school system (R. 1456–1457; 1462–1463).

The desegregation plan in question is the plan challenged on the appeal in No. 489 (fully described in our Motion to Affirm therein at pp. 7–8) and it is essentially the same as the plan adopted by the Fifth Circuit in *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, decision on rehearing *en banc* at 380 F. 2d 385, certiorari denied, October 9, 1967 (Nos. 256, 282 and 301).

ARGUMENT

The appellants complain of the procedure followed by the court. We submit, however, that the court's action here was an appropriate means of effectuating its earlier decree directing State officials to use their offices to achieve State-wide school desegregation. To be sure, the court might have entered an order enjoining the State from continuing any financial aid or other assistance to non-complying districts. But there can hardly be complaint because the court avoided that harsh course and, instead, adopted the procedure of joining noncomplying districts on an individual basis and affording each of them an opportunity for an evidentiary hearing before ordering compliance with the model desegregation plan.[4]

[4] Notice of the procedure to be followed was given by the court in its March 22, 1967, opinion in the main case (267 F. Supp. at 479): "in some instances a particular school district will need to be brought directly into the litigation to insure that the defendant State officials have implemented this Court's decree and that the state is not supporting, financially or otherwise, a local system that is being operated on an unconstitutional basis."

The objections of improper joinder and lack of venue are without merit. The basis of the district court's action in No. 489 was the existence of a State-wide policy to discourage desegregation. In that circumstance it was entirely proper under the "series of transactions or occurrences" clause of Rule 20(a) of the Federal Rules of Civil Procedure to join both State-wide and local officials. *United States* v. *Mississippi*, 380 U.S. 128, 141–43. And, for the same reason, as *United States* v. *Mississippi* holds (380 U.S. at 142–143), the venue objection must fall. See 28 U.S.C. § 1392(a). Of course, the district court clearly had personal jurisdiction over the defendants. F.R. Civ. P., Rule 4(f).

In conclusion, we emphasize that no school system has been directly ordered to adopt a desegregation plan without first being joined as a party and given an opportunity to be heard.[5] Such hearings have not been mere formalities. Three other school systems added as parties defendant contemporaneously with the appellants were dropped by the district court's order of May 18, 1967, upon a showing that they were in substantial compliance with the obligation to desegregate. By contrast, these appellants have

[5] Upon the United States' motion to add parties and for an order to show cause, the district court directed that appellants be served with copies of the motion and the order adding the appellants as parties. The court further directed the clerk to make available copies of all pleadings, orders or decrees in the case (J.S. in No. 480, A179). Against this background, the appellants cannot now complain that the pleadings did not make out a charge against the Board and did not state a claim upon which relief could be granted. See F.R. Civ. P., Rule 8.

apparently taken no steps to obey the constitutional mandate or the order of the State Superintendent. Nor have they offered a defense. In the circumstances, the district court was fully warranted in entering the desegregation decree appealed from.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHN DOAR,
Assistant Attorney General.

OCTOBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 671

THE BIBB COUNTY BOARD OF EDUCATION, ELLINGTON P. JONES, HENRY BOLDING, BRITT COX, C. E. HORNSBY, JR., and FRANCIS B. PRATT,

Appellants,

—v.—

ANTHONY T. LEE and HENRY A. LEE, by Detroit Lee and Hattie M. Lee, their parents and next friends; PALMER SULLINS, JR., ALAN D. SULLINS and MARSHA MARIE SULLINS, by Palmer Sullins and Della D. Sullins, their parents and next friends; GERALD WARREN BILLES and HELOISE ELAINE BILLES, by I. V. Billes, their father and next friend; WILLIE M. JACKSON, JR., by Mabel H. Jackson, his mother and next friend; WILLIE B. WYATT, JR., and BRENDA J. WYATT, by Willie B. Wyatt and Thelma A. Wyatt, their parents and next friends; NELSON N. BOGGAN, JR., by Nelson Boggan, Sr., and Mamie Boggan, his parents and next friends; WILLIE C. JOHNSON, JR., BRENDA FAYE JOHNSON and DWIGHT W. JOHNSON, by Willie C. Johnson and Ruth Johnson, their parents and next friends, and WILLIAM H. MOORE and EDWINA M. MOORE, by L. James Moore and Edna M. Moore, their parents and next friends,

—and—

UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 671

THE BIBB COUNTY BOARD OF EDUCATION, ELLINGTON P. JONES, HENRY BOLDING, BRITT COX, C. E. HORNSBY, JR., and FRANCIS B. PRATT,

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—and—

UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM

Appellees Anthony T. Lee, *et al.*,[1] respectfully move the Court, pursuant to Rule 16(1)(c) of the Rules of the

[1] Appellees Lee, *et al.* are the original plaintiffs in the case of *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967), on appeal here, sub nom. *Wallace* v. *Lee*, No. 489—out of which the instant proceeding arose. On behalf of the class of

Court, to affirm the judgment below, because the questions presented "are so unsubstantial as not to need further argument."

Since appellants have omitted the argument portion of their jurisdictional statement,[2] appellees must necessarily guess as to the nature of their arguments. However, extrapolating arguments from the "questions presented" portion of the jurisdictional statement, one finds nothing of substance.

First, appellants raise a venue objection, citing 28 U. S. C. §1391. That objection is squarely met by 28 U. S. C. §1392(a).

Second, appellants raise an objection as to joinder, citing Rule 20, F. R. Civ. P. Not only was joinder permissible under Rule 20, but it was probably required under Rule 19(a), since, subsequent to the entry of the order in *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M. D. Ala. 1967) on appeal here, sub nom. *Wallace* v. *Lee*, No. 489, the joinder of appellants became necessary to afford appellees complete relief. The district court in the main case antici-

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all Negro schoolchildren in Alabama, they filed the supplemental complaint and motion requesting the court below to order the state-wide desegregation plan now in effect in Alabama (see 267 F. Supp. at 461-62). Thus they clearly are appellees here pursuant to Rule 10(4), despite their omission by appellants from the jurisdictional statement. In the main case, No. 489, appellees Lee, *et al.* have heretofore filed an opposition to an application for stay pending appeal, *Wallace* v. *Lee*, 387 U. S. 916 (1967), and a motion to affirm.

[2] This omission appears to be a violation of Rule 13(2), which requires that a jurisdictional statement comply in *all* respects with Rule 15; Rule 15(1)(f) requires that the jurisdictional statement contain "a statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution."

pated that certain recalcitrant local school boards might refuse to comply with the Court's school desegregation requirements and might later need to be joined in the action. The Court observed (267 F. Supp. at 479):

> We are dealing here with state officials, and all we require at this time is that those officials affirmatively exercise their control and authority to implement a plan on a state-wide basis designed to insure a reasonable attainment of equal educational opportunities for all children in the state regardless of their race. It may be that in some instances a particular school district will need to be brought directly into the litigation to insure that the defendant state officials have implemented this Court's decree and that the state is not supporting, financially or otherwise, a local system that is being operated on an unconstitutional basis. Hopefully, these instances will be the exception and not the rule.

Fortunately, the Bibb County Board of Education *has* been the exception and not the rule: virtually all the 99 school boards subject to the district court's desegregation requirements have brought themselves into compliance and only a few have had to be joined in the main case.

Third, appellants object to the relief granted against them. Appellants were ordered to adopt a desegregation plan (see Jurisdictional Statement, pp. 20-32) substantially similar to the model decree formulated by the Court of Appeals for the Fifth Circuit in *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836 (5th Cir. 1966), approved *en banc*, 380 F. 2d 385 (5th Cir. 1967), cert. den. sub nom., *Caddo Parish School Board* v.

United States (Nos. 256, 282 and 301), —— U. S. ——, October 9, 1967. This plan has been adopted by virtually all the school districts in the State of Alabama. Yet, 13 years after *Brown v. Board of Education*, 347 U. S. 483 (1954), appellants resist. That resistance no longer raises a substantial federal question.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* UNITED STATES ET AL.; and

BIBB COUNTY BOARD OF EDUCATION ET AL. *v.* UNITED STATES ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

Nos. 489 and 671. Decided December 4, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.